No. 352

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

GENERAL MOTORS CORPORATION,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, General Motors Corporation, respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit entered in these cases on February 13, 1964, as modified on May 7, 1964.

OPINIONS BELOW

The findings of fact and opinion of the District of Columbia Tax Court (R. 484-533, 559-567) are not officially reported and are printed as amended in Appendix A hereto, p. 1a, *infra*. The majority and dissenting opinions of a division of the Court of Appeals are

printed in Appendix B hereto, p. 42a, *infra*. The majority and dissenting opinions of the Court of Appeals on rehearing *en banc*, printed in Appendix C hereto, p. 46a, *infra*, are reported at —— F.2d——.

JURISDICTION

The judgments of the Court of Appeals on rehearing *en banc* were entered on February 13, 1964, Appendix D, p. 82a, *infra*. A petition for rehearing to modify the judgments was timely filed on February 25, 1964 and was granted on May 7, 1964, —— F.2d ——, Appendix E and F, pp. 83a, 85a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. ***Interstate Commerce, Due Process and Territorial Jurisdiction.***

Whether the single-factor sales formula for the "apportionment" of net income, prescribed by the Commissioners of the District of Columbia purportedly under authority of the District of Columbia Income and Franchise Tax Act of 1947, is invalid:

(a) as repugnant to the Due Process Clause of the Fifth Amendment to the Constitution;

(b) as repugnant to the Commerce Clause of the Constitution; or

(c) as unconstitutionally extending the power of the Commissioners beyond their territorial jurisdiction;

when the application of such formula results in the taxation by the District of 100% of the net income of a foreign corporation derived from that segment of its business consisting of the manufacture and sale of products without the District to customers within the District, thus

(1) taxing extraterritorial values and assigning to the District values which belong to, and have been properly taxed by, other States;

(2) imposing upon interstate commerce cumulative tax burdens (double taxation) to which local commerce is not subject; and

(3) subjecting to District tax an amount of income out of all reasonable proportion to the business actually "carried on or engaged in" within the District.

II. *Statutory Construction*

Whether the District of Columbia Income and Franchise Tax Act of 1947, which imposes a franchise tax on corporations carrying on business within and without the District, measured by net income "fairly attributable" to District business, permits the adoption by regulation of the District Commissioners of a single-factor sales formula to determine the amount of such taxable income, when the application of such formula subjects to District tax 100% of the net income of a foreign corporation derived from that segment of its business consisting of the manufacture and sale of products without the District to customers within the District, a percentage which is out of all reasonable proportion to the business carried on within the District.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Art. I, § 8, cl. 3 of the Constitution of the United States and the Due Process Clause of the Fifth Amendment thereto are set forth in Appendix G-1, p. 86a, *infra*.

The pertinent sections of the District of Columbia Income and Franchise Tax Act of 1947, being §§ 47-1580 and 47-1580a of the D.C. Code 1961, are set forth in Appendix G-2, pp. 86a-88a, *infra*.

Section 10.2-(c)(1)(a) of the Regulations of August 6, 1953 (as relettered by amendment of July 24, 1956) is set forth in Appendix G-3, pp. 88a-89a, *infra*.

STATEMENT OF THE CASE

Petitioner, General Motors Corporation, brought proceedings in the District of Columbia Tax Court for the review of franchise tax deficiencies for the taxable years 1957 and 1958 assessed by respondent, District of Columbia, purportedly pursuant to the District's Income and Franchise Tax Act of 1947 (D.C. Code 1961, §§ 47-1551 *et seq.*); and for refund of the taxes so assessed and paid under protest. (R. 1-37.)

General Motors is a Delaware corporation qualified to do business in the District. (R. 465.) In the taxable years involved it was engaged principally in the manufacture of motor vehicles, parts and accessories therefor. Such manufacture was accomplished entirely outside the District, and largely (as to the products herein involved) in Michigan, Delaware and Maryland. (R. 399-400, 484-485.) Some of such products were sold to customers (retail dealers) whose places of business were in the District, and were shipped to them there. Not only the entire manufacturing activity, but most of the selling activity was carried on without the District. (R. 400-456, 471-483.)

The sales offices were outside the District. Personnel from those offices, none of whom resided in the District, regularly called on customers in the District for promotional purposes and for checking on and assisting in improving their operations. Several small offices were maintained in the District (*e.g.*, a public relations office; a patent office), but they were not directly related to the taxed sales and their presence had no bearing on the assessments. (R. 399-464, 471-477.)

In determining the amount of petitioner's total net income subject to franchise tax in the District, respondent multiplied such total net income by a fraction the numerator of which was the amount of sales by petitioner to customers located in the District and the denominator of which was total sales everywhere. In other words, it determined and taxed the total profit on all sales to customers located in the District (on the assumption that each sale was equally profitable). This is referred to herein as a "single-factor sales formula," in contrast to apportionment formulae which take into account the contribution of capital and labor to the production of income.

The Tax Court made the following *findings of fact*: The segment of petitioner's business which was conducted both within and without the District consisted of the manufacture of motor vehicles and related products without the District and their sale to customers located within the District. The net income from this segment of the business was earned by a series of transactions, including procurement of material, use of property, financing and manufacture in various States and ending with sales to customers located in the District. Finding 5, Appendix A, p. 3a, *infra*. The single-factor sales formula used in determining taxable net income assigned to the District 100% of the net income arising from that segment of the business and was out of all reasonable proportion to the trade or business carried on or engaged in by General Motors in the District. Finding 6, Appendix A, p. 3a, *infra*. A portion of the net income derived from that segment of the business consisting of the manufacture without the District and sale to dealers in the District was taxed in Michigan, Maryland and Delaware, the States of manufacture, pursuant to apportionment formulae provided in their income-based tax laws. Findings 3(a), 3(b), Appendix A, p. 2a, *infra*.

The record overwhelmingly sustains the Tax Court's findings. The testimony shows that petitioner's net income is derived from the totality of its activities, from design and engineering, through procurement of materials, use of plants and other property, management, and selling and other activities, and that the extent of the contribution of each of these elements is measured by its cost and geographically attributable to the places where the costs (property and payroll) are incurred. (R. 45, 48-58, 76-7, 81-3, 90-6, 98-9, 112, 114-5, 117-8, 124-6, 134-7, 142-3, 148-55, 327-8, 349-55, 372-8.) Applying those facts to the stipulated figures (R. 477-481) produced a highly accurate computation of petitioner's income derived from business carried on in the District. (Appendix H, p. 90a, *infra*.) The amounts assessed are approximately thirteen times such income. The single-factor sales formula assigns to the District for tax purposes 100% of the net income derived from that segment of the business culminating in receipts from District customers even though the products were manufactured and sold elsewhere. (R. 154-155, 328, 331-332.) The District's own witnesses testified that taxing 100% of such net income failed to apportion such income as required by the statute. (R. 285-9, 313-22.) Multiple taxation of such net income was established by the Michigan, Maryland and Delaware tax returns and evidence of payment made part of the record. (Pet. Trial Exh. 9-21f.)

The Tax Court held on this record that the single-factor sales formula as applied in the circumstances of this case produced an arbitrary and unreasonable result, violating the apportionment provisions of the Act (D.C. Code 1961, §§ 47-1580, 47-1580a), since it identified, but did not apportion, the income derived from business conducted within and without the District. Thus it invalidated the formula as applied to petitioner and redetermined the tax deficiencies using a three-factor formula of prop-

erty, payroll and sales, each factor receiving equal weight, as the method best suited to determine the portion of petitioner's net income subject to tax. It did not decide the constitutional questions raised. Appendix A, p. 1a, *infra*.

The District appealed the Tax Court decisions to the Court of Appeals for the District of Columbia Circuit. On February 21, 1963, a division of the Court, one judge dissenting, affirmed the Tax Court, Appendix B, p. 42a, *infra*. That Court granted, on April 18, 1963, the District's petition for rehearing *en banc*, and on February 13, 1964, five judges reversed the decisions of the division and of the Tax Court and affirmed the deficiency assessments, deciding the statutory and constitutional questions adversely to petitioner. Four judges dissented (one concurring in part on a procedural matter). Appendix C, p. 46a, *infra*.

Petitioner timely filed on February 25, 1964, a petition for rehearing to modify the judgments of February 13, 1964, which petition was granted on May 7, 1964. The final judgment entered on that day holds that all net income from "District sales" must be assigned to the District for tax purposes, but leaves for subsequent determination what sales are "District sales"—i.e., "fairly attributable" to business carried on in the District. Appendix E and F, pp. 83a, 85a, *infra*. Review by this Court is sought at this time because, in our opinion, regardless of what sales are ultimately found to be "District sales", the taxing of 100% of the income derived from the business culminating therein is both contrary to the statutory direction that such income be apportioned and unconstitutional. A determination of that issue is "fundamental to the further conduct of the case". *United States v. General Motors Corporation*, 323 U.S. 373, 377. The remand for computation would not resolve any of the questions raised in this petition.

BASIS FOR FEDERAL JURISDICTION IN THE LOWER COURTS

These proceedings were commenced by General Motors in the District of Columbia Tax Court under § 47-1593, D.C. Code 1961. The District, pursuant to § 47-2404, D.C. Code 1961, perfected appeals to the Court of Appeals for the District of Columbia Circuit.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has:

(a) erroneously decided an important question of constitutional law with respect to the apportionment for tax purposes of the net income of corporations doing business in more than one jurisdiction, in conflict with applicable decisions of this Court; and

(b) erroneously construed the District of Columbia Income and Franchise Tax Act of 1947 in a manner affecting every taxpayer doing interstate business in the District.

1. Impact of the Decision.

If allowed to stand, this decision will have an important direct effect in the District of Columbia, where at least 48 cases controlled by it are pending before the Tax Court and an unknown number of others are awaiting administrative determination. Of far greater importance, however, is the national impact.

It has recently been estimated by a Congressional subcommittee that no less than 120,000 corporations, ranging from the size of petitioner to small family enterprises, engage in interstate commerce and thus are potentially subject to income taxation in more than one jurisdiction.[1]

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[1] "State Taxation of Interstate Commerce", Report of the Special Subcommittee on State Taxation of Interstate Commerce of the

Since 38 states and 95 municipalities now impose taxes on (or measured by) net income of corporations, and the practice is spreading,[2] the need for a clear outline of constitutional limitations, which can be supplied by this Court alone, is great. This Court has now, in the 1959 decision in *Northwestern States*,[3] made it clear that States may tax the net income of exclusively interstate commerce, *provided it is fairly apportioned.* One result of that decision is greatly to increase the number of taxpayers concerned with the answer to the question of what is fair apportionment.

Although this Court cannot be expected to devise and impose an apportionment formula for uniform application, it can and should prescribe the outer limits of fair apportionment. This case is both a striking illustration of the need for such guidelines and an excellent opportunity, at the most opportune time, to establish them.

The effect of the decision below is to permit the State or city in which all a taxpayer's customers are located to tax the entire net income of the taxpayer, even though the taxpayer's entire operations are elsewhere (nexus assumed). Note the temptation which this offers to exact tribute from the foreigner while subsidizing the domiciliary. Attempts to do just that are a virtual certainty if this decision stands, and appeals to this Court for relief are equally certain. The time to dispose of them is now.

2. The Assessments are Unconstitutional.

Although this Court has several times considered the constitutional restraints upon the formulae which may

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Committee on the Judiciary of the House of Representatives, pursuant to P. L. 86-272, House Report No. 1480, 88th Cong., 2d. Sess. 77, 593 (June 15, 1964).

[2] *Id.*, pp. 99, 447.

[3] *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450.

be applied in apportioning net income, this is the first time the Court has been confronted with a decision in which an appellate court has upheld the constitutionality of an apportionment formula in the face of a square finding by the trier of the facts, based upon a record which "overwhelmingly sustains" such finding,[4] that the percentage of income subjected to tax was "out of all reasonable proportion to the trade or business carried on or engaged in by petitioner within the" taxing jurisdiction.[5]

The District formula (allocating entire net income to the situs of the customer) is wholly incompatible with formulae which have been approved by this Court: *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113 (apportionment by the State of manufacture according to situs of property); *Bass, Ratcliff & Gretton* v. *State Tax Commission*, 266 U.S. 271 (apportionment by the State of sale according to situs of property); *Butler Bros.* v. *McColgan*, 315 U.S. 501 (apportionment by three-factor formula of property, payroll and sales versus separate accounting); *Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (apportionment by three-factor formula of property, payroll and sales); *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (apportionment by three-factor formula of property, payroll and sales).

It is obvious that if the apportionment formulae in those cases were "fair" the allocation in this case cannot be, because it necessarily results in double taxation of income earned in a State employing such an approved formula if sales are made to customers in the District. The Tax Court found *as a fact* that such double taxation existed in this case, because the same income which the District taxed in its entirety had been partially taxed

[4] See dissenting opinion of Judges Danaher, Miller, and Bastian in the Court of Appeals, App. C, p. 80a, *infra*.

[5] Finding No. 6, App. A, p. 3a, *infra*.

by Michigan, Maryland and Delaware pursuant to formulae of the type approved in *Butler Bros.*, *Spector* and *Northwestern States.*[6]

The Commerce Clause prohibits the imposition upon interstate commerce of such cumulative burdens to which intrastate business is not subject.[7] *H. P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 538-539; *Western Livestock* v. *Bureau of Revenue*, 303 U.S. 250, 255-256; *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 170; *J. D. Adams Mfg. Co.* v. *Storen*, 304 U.S. 307, 311-312; *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458, 462-463.

The assessments also attempt to reach values not within the territorial jurisdiction of the District. The Tax Court found *as a fact* that the income which the District taxed in its entirety was earned by a series of transactions, most of which took place outside the District,[8] and further found *as a fact* that the amount of income so assessed was out of all reasonable proportion to the business done in the District.[9] As the Due Process Clause of the Fourteenth Amendment restrains States from taxing values not within their jurisdiction, *Wallace* v. *Hines*, 253 U.S. 66,70, and prohibits the use of any apportionment or allocation which, either intrinsically or as applied in particular circumstances, taxes "a percentage of income out of all appropriate proportion to the business transacted . . . in that State", *Hans Rees' Sons* v. *North*

[6] Finding 3(b), App. A, p. 2a, *infra*.

[7] The Commerce Clause, being a grant of power to Congress, does not circumscribe Congressional power to legislate for the District, *Neild* v. *District of Columbia*, 110 F.2d 246 (D.C. Cir.), but it does restrain the District Commissioners. *Stoutenburgh* v. *Hennick*, 129 U.S. 141, 148; *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100, 107. The objectionable formula was not prescribed by Congress, which merely directed a fair apportionment, but by the Commissioners.

[8] Finding 5, App. A, p. 3a, *infra*.

[9] Finding 6, App. A, p. 3a, *infra*.

Carolina, 283 U.S. 123, 135, so does the Due Process Clause of the Fifth Amendment restrain Congress, and *a fortiori*, the Commissioners, in legislating for the District. *Bolling* v. *Sharpe*, 347 U.S. 497, 499; *Hamilton National Bank* v. *District of Columbia*, 176 F.2d 624 (D.C. Cir.), *cert. den.*, 338 U.S. 891.

Furthermore, even apart from the specific constitutional protection of "due process", a State may not reach transactions outside its territoral jurisdiction. *New York, Lake Erie & Western R.R. Co.* v. *Pennsylvania*, 153 U.S. 628, 646; *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 342. The District Commissioners have no greater power.

Double Taxation Was Established

The Court of Appeals apparently recognizes that double taxation of the income of interstate commerce, solely because it is interstate, unconstitutionally imposes upon interstate commerce cumulative burdens not borne by intrastate commerce. It says, however, that petitioner has "failed to" "show by specific evidence that 'double taxation' would result from the application of the District's formula".[10] In doing so, it ignores the combined effect of findings of fact that: The vehicles sold to District customers were manufactured in Michigan, Maryland and Delaware;[11] petitioner's income related to sales to customers in the District was attributable in part to such manufacture;[12] tax was (properly) paid to those States with respect to a portion, determined by formulae of property, payroll and sales, of income derived from such manufacture and subsequent sale;[13] and the District's assessments, based on sales alone, taxed 100% of such income.[14]

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[10] Opinion, App. C, p. 72a, *infra*.

[11] Finding 2, App. A, p. 1a, *infra*.

[12] Finding 5, App. A, p. 3a, *infra*.

[13] Finding 3, App. A, p. 2a, *infra*.

[14] Finding 6, App. A, p. 3a, *infra*.

Those findings, which are undisputed, should have led the Court of Appeals inescapably to the conclusion that double taxation had in fact been established and that it was attributable to the overreaching of the District's single factor destination sales formula.

While the Tax Court thus found that part of the *same* income which the District assessed in its entirety had been taxed elsewhere, and no contention was made by respondent that such finding was not based on ample evidence, the Court of Appeals still says that there was no showing of double taxation and that "the company has produced only a hypothetical situation to prove its case". Simplified hypothetical figures were indeed used in the brief to show *how* the double taxation resulted necessarily from the District's improper "formula", but the *fact* of double taxation found by the Tax Court was demonstrated by evidence, not by hypothesis.

What the hypothetical argument demonstrated was that the double taxation was no merely minor overlap, but a really substantial duplication. Nearly all of petitioner's relevant income-producing facilities and activities were in other States which, using three-factor formulae, attributed almost two-thirds of the income to the capital and labor employed in those States, and one-third to the sale.[15] Inevitably, when the District used a single-factor sales formula which attributes three-thirds of the income to the sale, and ignored the contribution of the activities in the producing States, approximately two-thirds of the income was taxed twice.[16] Such duplica-

[15] To the extent that the property and payroll were present in the jurisdiction where the sale occurred, the proportions stated would vary. But those factors were minimal here, as the stipulated facts summarized in Appendix H, p. 90a, *infra*, demonstrate.

[16] Petitioner's "hypothetical argument" is quoted by the court, App. C, p. 73a, *infra*. A comparable "simplified example" was found "commendable" by this Court in clarifying the isues in *United States* v. *Consolidated Edison Co.*, 366 U.S. 380, 382. Our example was used for that purpose, and was based on the evidence, not offered as a substitute for evidence.

tion was grossly discriminatory against interstate commerce, since another corporation, both manufacturing and selling in the District, would be taxed on only 100% of its income, not on 166⅔%.

Grossly Disproportionate Taxation Was Established

The Tax Court found *as a fact* that the *taxed* income was earned by a series of transactions—manufacturing, etc.—which took place outside the District.[17] Then it continued:[18]

> "The method used by the assessing authority of the District attributed to the District 100 per centum of the net income derived by the petitoner from that segment of its business which consisted of the manfacture without, and the sale of the products within the District. The percentage thus determined was out of all reasonable proportion to the trade or business carried on or engaged in by petitioner within the District."

Thus the Tax Court has set up a perfect syllogism:

(a) the income arising from business culminating in sales to District customers was in part earned by activities outside the District;

(b) the District formula taxed 100% of such income;

(c) that percentage was grossly disproportionate to the activities in the District.

The Court of Appeals does not deny the factual correctness of the premises (a) and (b), findings which were not only based upon ample evidence, including the testimony of the District's own witnesses (R. 285-9, 313-22), but which, as to (b), are demonstrable from the structure of the regulation (as applied) itself. Instead, it reasoned

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[17] Finding 5, App. A, p. 3a, *infra*.

[18] Finding 6, App. A, p. 3a, *infra*.

that because the Tax Court made the legal error of thinking that only the segment income was to be apportioned rather than the entire income from all operations, whether or not touching the District, (b) above was vitiated, and hence (c) must fall. The *non-sequitur* is obvious. Actually, both petitioner and the Tax Court recognized from the beginning that the entire income was to be apportioned, as shown in the Tax Court's computations (App. A, p. 23a, *infra*). Aside from that, however, it is clear that the syllogism moves from fact to fact, without the application of any view of the law, right or wrong, and that the conclusion (c) is inescapable. It is a finding of fact binding on the Court of Appeals.

The statement of the Court of Appeals that the finding is "irrelevant" [19] flies squarely in the face of this Court's decision in *Hans Rees' Sons* v. *North Carolina*, 283 U.S. 123, 135, where just such a finding as the Tax Court made here was made the basis for invalidating an apportionment formula as applied to the taxpayer before the Court. The majority below sought to distinguish *Hans Rees' Sons* on the ground that the proof "must be much more detailed and specific than that adduced here," and that petitioner "did not undertake to show that the District of Columbia operations accounted for a specific percentage of General Motors' total income, which percentage could, as in *Hans Rees' Sons*, be compared with that taxed under the single-factor formula . . . Nowhere in the record do there appear specific percentages of the kind accepted by the Supreme Court in *Hans Rees' Sons*." [20] Precision in assign-

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[19] App. C. p. 66a, *infra*.

[20] App. C, pp. 68a, 70a, *infra*. Petitioner had been forewarned by the Court of Appeals decision in *Smoot Sand & Gravel Co.* v. *District of Columbia*, 261 F.2d 758 (D.C. Cir.), *cert. den.*, 359 U.S. 968, in which the taxpayer sought protection under the doctrine of *Hans Rees' Sons*. *Smoot* showed that all its "manufacturing" operations took place in Virginia, and offered measures by which to

ing an exact percentage of income to its source, however, is a recognized impossibility. It was not present in *Hans Rees' Sons* (where alternative analyses ascribed from 17 to 21.7% of income to the taxing jurisdiction), and this Court declared that it was *not necessary* "to determine as a matter of fact the precise part of the income which should be regarded as attributable to the business conducted in North Carolina," in order to determine that the amount taxed was excessive. (pp. 134-135 of 283 U.S.)

In *Hans Rees' Sons*, the evidence by which the reasonableness of the apportionment was tested was an application of separate accounting, which was feasible in the case of a simple business dealing in a single fungible product. But in a complex unitary business, arriving at a meaningful apportionment of income by separate accounting is not merely infeasible; it has been rejected as an *impermissible* means of testing the validity of an apportionment formula. *Butler Bros.* v. *McColgan*, 315 U.S. 501, 506-9. To hold that no evidence other than the kind presented in *Hans Rees' Sons* can be used to test a formula would nullify the constitutional protection against arbitrary and excessive apportionment in the case of all but the simplest businesses in our complex society.

Petitioner presented testimony of acknowledged experts in economic analysis, establishing that petitioner's net income is created by and derived from the totality of its activities and efforts as an integrated manufacturing and

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determine what part of its income was attributable thereto. The court thought the measures were irrelevant because it had not been shown in principle that manufacturing contributed anything at all to the production of income. Apparently, Smoot had not thought it necessary to prove that point, in view of the pronouncements of this Court that income is the product of capital and labor, a proposition which seems self-evident. However, since it was not self-evident to the Court of Appeals, we undertook to, and did, prove it by expert testimony, and then went on to prove similarly the best ways of measuring those contributions and attributing them geographically. The precise figures were stipulated.

selling business; that the place where such income is produced is where the factors of production are employed to earn it; and that cost is the best measure of the contribution of such factors to the production of income. (R. 45, 48-58, 76-7, 81-3, 90-6, 98-9, 112, 114-5, 117-8, 124-6, 134-7, 142-3, 148-55, 327-8, 349-55, 372-8.) The stipulated facts (which are summarized in tabular form in Appendix H, p. 90a, *infra*) established that the factors of production, capital and labor, even with respect to the products sold to customers located in the District, were employed almost exclusively in other jurisdictions, and that the allocation of income based exclusively on the customers' location attributed to the District many times the amount of income properly attributable to the factors of production applied therein. (R. 477-481.)

The Tax Court found that the income taxed by the District was largely attributable to activities elsewhere. Then, relying upon the expert testimony and stipulated facts, it measured the contributions of capital and labor, and determined their geographical locations with far more precision than was possible in *Hans Rees' Sons*—in the District, the averages being .0348% in 1957 and .0366% in 1958.[21] Furthermore, when contrasted with the sales ratios on which the tax was based (.3930% for 1957 and .4875% for 1958), they show a far greater disproportion than in *Hans Rees' Sons* between the assessments and the income locally derived.

This Court has repeatedly expressed itself in accord with the view of the expert witnesses, in holding that "The profits of the corporation were largely earned by a series of transactions beginning with manufacture . . . and ending with sale . . . ." *Underwood Typewriter Co.*

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[21] For 1957, .0218% for property and .0477% for payroll in the District. For 1958, .0207% for property and .0524% for payroll. The derivation of those figures, which the Tax Court determined (App. A, pp. 26a, 27a, *infra*), is shown in App. H, p. 90a, *infra*.

v. *Chamberlain*, 254 U.S. 113, 120; *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U.S. 271, 282; *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U.S. 123. The majority below recognized such agreement in theory, but declared that "The theory proved the case in *Underwood* no better than it does here." [22]

In so stating, the court below missed the point of the *Underwood* decision. The apportionment formula in *Underwood*, as in *Bass* and *Rees*, was based on a single factor of *property*. A formula based on only one of the factors of production, and ignoring the rest, may achieve a permissible rough approximation in a particular case if the disregarded elements exist in the jurisdiction in proportions not too far different from the factor which is considered.[23] In *Underwood*, in the absence of evidence to the contrary (such as was presented in *Rees*), the Court sustained the single-factor property formula as one which, "for all that appears in this record, reached, and was meant to reach, only the profits earned within this State" (254 U.S. at 121).

In contrast, the single-factor *sales* formula reaches, and is designed to reach, the *entire* net income connected with every sale into the District, including profits earned by the application of capital and services in other jurisdictions.

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[22] App. C, p. 69a, *infra*.

[23] The Court of Appeals cites *Ford Motor Co.* v. *Beauchamp*, 308 U.S. 331, *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U.S. 271, and *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, for the proposition "that a single-factor formula is not inherently arbitrary or unreasonable". That is true, provided that the factor is selected and applied appropriately in the individual case. It is "arbitrary and unreasonable" if in a particular case it produces a seriously unjust result. *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U.S. 123. It is worth noting that the formulae involved in *Ford Motor*, *Bass, Ratcliff & Gretton*, *Underwood Typewriter*, and *Hans Rees'* if applied in this case would reduce General Motors' tax liability to the District near zero and that the formula involved in *Butler Bros.*, *Spector*, and *Northwestern States* would have reached a result substantially similar to that reached by the Tax Court.

The so-called "formula" does not apportion income at all, but merely identifies "the net profits from the entire transaction," a step which should be merely preliminary to apportioning such profits.[24] In sustaining the tax in the face of the record and the findings, the majority of the Court of Appeals has placed itself in direct conflict with this Court's declaration that the *Underwood* and *Bass* decisions "are not authority for the conclusion that where a corporation manufactures in one State and sells in another, the net profits of the entire transaction, as a unitary enterprise, may be attributed, regardless of evidence, to either State." *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U.S. 123, 132. The conflict of decisions is not lessened by the fact that the nature of the evidence on which the trial court's finding was based differed from that presented in *Hans Rees' Sons.*

3. The Assessments Are Contrary to the Statute.

Although "the importance of the problem to the administration of local taxes"[25] was sufficient to move the Court of Appeals to grant a rehearing *en banc*,[26] we recognize that this Court ordinarily respects the construction of District statutes adopted by the Court of Appeals. In this instance, however, the question of statutory construction lies at the base of the constitutional issues.

The District of Columbia Income and Franchise Tax Act of 1947 (D.C. Code 1961 § 47-1551 *et seq.*) imposes a "franchise tax upon every corporation . . . for the privilege of carrying on or engaging in any trade or business within the District", measured by "that portion of the

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[24] Respondent's witness Watson testified that, as an economic matter, "the net income from any one batch of sales . . . is proportionate to the net income from any other batch of sales." (R. 270). The single-factor formula, in effect, applies an average rate of profit to all sales and thereby determines the *total profit* on all business culminating in sales to District customers.

[25] The importance is national, as well. Point 1, *supra*.

[26] App. C, p. 46a, *infra*.

net income of the corporation . . . as is fairly attributable to any trade or business carried on or engaged in within the District." If the business "is carried on or engaged in both within and without the District, the net income derived therefrom shall . . . be deemed to be income from sources within and without the District," and "the portion thereof subject to tax . . . shall be determined under . . . regulations prescribed by the Commissioners."[27]

There can be no complaint about the statute itself. The fault lies in the exercise of that delegation, both in the regulation itself and in its application. The regulation assigns to the District that percentage of the corporation's net income that "the District sales . . . bear to the total sales made everywhere . . . 'District sales' shall mean all sales to District customers the income from which is fairly attributable to the trade or business carried on or engaged in within the District . . ."[28] In applying that regulation, the District construed "District sales" to mean all sales to customers located in the District, regardless of all other considerations. This, in tax parlance, is known as the "destination sales" test.[29] It assumes, as some of the District's witnesses testified, that net income is "fairly attributable" in its entirety to the customer and his location, and in no part to manufacturing and selling activities which take place elsewhere.

The Tax Court sustained the petitioner's position that this test, as applied, was not authorized by the statute, since it merely *identified* the amount of net income derived from that segment of petitioner's business conducted both

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[27] D. C. Code 1961 § 47-1580, 1580a, App. G, p. 85a, *infra*. Part IV of the Tax Court's opinion, App. A, pp. 13a-17a, *infra*, contains a helpful discussion of the history of the statute.

[28] App. G, p. 88a, *infra*.

[29] It does not reach actual destination with any certainty—merely the point to which the goods are shipped in the first instance. A General Motors dealer in the District may sell a car to a customer in Maryland, or may transfer one to a branch in Virginia and sell it there.

within and without the District, segregating it from income derived from petitioner's business conducted wholly without the District. It did not follow the statutory mandate that such income be deemed to be from sources both within and without the District (as the District's expert witnesses admitted),[30] and it did not *apportion* it. Instead, it *allocated* it 100% to the District, as the Tax Court specifically found.[31]

The majority of the Court of Appeals held[32] that the assessments satisfied the statutory requirement of an apportionment because they divided the *entire* net income from all sources into taxable and nontaxable portions. The fact that the only segment of petitioner's income that had even a partial connection with District activities was taxed in its entirety, and not apportioned, was dismissed as irrelevant.

The Tax Court had pointed out the fallacy of this reasoning and emphasized it by noting that, if a corporation's entire manufacturing operation took place in Maryland and its entire product was sold in the District, the approach used in these assessments would assign 100% of the net income to the District, in direct conflict with the statutory command that such income be deemed to be derived from sources both within and without the District

[30] R. 285-289, 313-322.

[31] Finding 6, App. A, p. 3a, *infra*. Another respect in which the District's formula and assessments violate the statute is that they fail to tax at all other income which the statute directs shall be taxed. No income whatever is attributed to the offices in the District whose activities (patents, public relations, etc.) are unrelated to the taxed transactions. Such offices make some contributions to the entire income of the corporation, which income the statute deems to be derived partly from within the District and partly from without. The assessments put it all without. It does not matter that the deviations from the statute are in opposite directions and thus tend to offset. Each is a flagrant violation and the offset is very minor.

[32] Opinion, Court of Appeals, App. C, pp. 62a-66a, *infra*.

and apportioned accordingly.[33] Assume, for example, that the corporation's net income from such business in 1957 is $100,000. The statute clearly requires that such income be deemed to be derived in part from Maryland and in part from the District, and only that part "fairly attributable" to the District may be taxed there. Any regulation or assessment which says that 100% is "fairly attributable" to the District is obviously wrong, and presumably the Court of Appeals majority would have to agree that an apportionment had not been made as required by the statute. If by an apportionment formula, or separate accounting, or some other acceptable method it is determined that the correct portion is $25,000, the District is entitled to tax that much and Maryland the balance.

Now assume that in 1958 the corporation establishes a new factory in Pennsylvania, manufacturing a different product and selling it entirely to Pennsylvania customers, earning another $100,000 net income, while the Maryland-District business remains the same. It should be clear that income taxable in the District remains at $25,000, while Maryland has $75,000 and Pennsylvania $100,000. But the Court of Appeals would say that because the Pennsylvania income is not taxed by the District, it may now tax 100% of the Maryland-District income.

The confusion and conflict within the Court of Appeals is well illustrated by contrasting the decision below with that in *Broadcasting Publications, Inc.* v. *District of Columbia*, 313 F.2d 554 (D.C. Cir.), in which rehearing *en banc* was denied on January 25, 1963, while the present case was under submission. *Broadcasting Publications* involved a periodical published in the District, with 97% of its circulation in other jurisdictions. The Tax Court, relying on *District of Columbia* v. *Evening Star Newspaper Co.*, 273 F.2d 95 (D.C. Cir.), divided the income

[33] Opinion, Tax Court, App. A, p. 10a, *infra*.

according to the place of sale. But the Court of Appeals, minimizing the importance of the location of the customer, stressed the productive operations which "are the main elements . . . from which a formula of allocation must be derived," and the need to identify the "function which fairly reflects the geographical sources of income." (p. 559 of 313 F.2d.) Accordingly, the Court of Appeals concluded that the entire income of the taxpayer was taxable in the District, where almost all its productive activities and facilities were concentrated. A comparison of the facts of the cases, shows that *every consideration which brought Broadcasting Publications into the District puts General Motors outside the District.* If *Broadcasting Publications* is good law, General Motors cannot be taxed by the District at all.

General Motors does not, however, contend for complete exemption from District tax. It is satisfied with the disposition of the case by the Tax Court which, having found that there was no valid and applicable regulation prescribing an apportionment formula, exercised its own power to adopt the formula it determined to be "best suited" in the circumstances of the case. Its power to do so was established by *District of Columbia* v. *Gallant, Inc.*, 290 F.2d 745, 748 (D.C. Cir.). The three-factor formula which the Tax Court adopted, the suitability of which is fully supported by the record, attributed to the District approximately 39% of the profit derived from sales to District customers of products manufactured and sold elsewhere.[34]

CONCLUSION

Ten judges have considered this case. Five of them have accepted respondent's position. Five others, includ-

[34] Appendix A, pp. 26a, 27a, *infra*. The 39% figure is arrived at by comparing the percentage of net income actually taxed with that derived from the sales ratio, alone, which reflects the *total* profit on all sales to District customers.

ing the Tax Court judge who heard the evidence, have agreed with petitioner. Their view is forcefully expressed in the dissenting opinions below:

> "It does not do for the majority simply to say that as to *some* corporations and in *some* situations a single-factor formula may validily be utilized. Nor is it an answer to this taxpayer's contentions that the records in *some* cases have shown no more than that the single-factor formula has not resulted inequitably. We are here dealing with a record which overwhelmingly sustains the Tax Court's findings. I deem its conclusion inescapable that the single-factor sales formula utilized by the Assessor was here proved to be arbitrary and inequitable in its result . . . A study of the findings . . . necessarily impels a rejection of the single-factor sales formula *as here applied*." [35]
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> * * * *
>
> "I join with the dissent in viewing the Assessor's action as arbitrary and I would go further and hold that it is legally arbitrary and capricious . . ." [36]

For the foregoing reasons, the petition for a writ of certiorari in this case should be granted.

Respectfully submitted,

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[35] Judge Danaher, with whom Judges Miller and Bastian joined. App. C, pp. 80a, 81a, *infra*.

[36] Judge Burger, App. C, p. 81a, *infra*.

APPENDIX

INDEX TO APPENDIX

APPENDIX A

DISTRICT OF COLUMBIA TAX COURT

Findings of Fact and Opinion

[as filed January 29, 1962, with amendments of February 27, 1962 incorporated]

These two cases have been consolidated for hearing and disposition. They involve the same questions of taxation for the calendar years 1957 and 1958. The assessing authority of the District of Columbia assessed the petitioner substantial franchise taxes. The petitioner here appeals from the assessments and claims that they are invalid. The respondent insists that the assessments are proper and justified under Title X of the District of Columbia Income and Franchise Tax Act of 1947.[1]

Findings of Fact

Most of the facts are stipulated and, together with exhibits, are found as stipulated.

The Court finds additional facts for the taxable years involved as follows:

1. The petitioner had business establishments in 38 states and the District of Columbia. The principal office or headquarters of the petitioner was in Detroit, Michigan. There was an executive office in New York City in which were located the financial executives of the petitioner.

2. (a) The factories of the petitioner were located principally in the states of Michigan, Ohio, Illinois, Indiana, New York, New Jersey, Delaware, Maryland, Mis-

[1] Title X of Chapter 15 (Sections 47-1580 and 47-1580a), D. C. Code, 1951 Edition.

souri, California and Georgia. There was no factory or assembly plant of the petitioner in the District of Columbia.

(b) Approximately fifty per centum of petitioner's physical properties, including factories, equipment and inventories, and payroll amounts were located or paid in Michigan.

(c) All Cadillac automobiles and all heavy trucks of the petitioner's GMC and Coach Divisions were manufactured in Michigan. In addition, many component parts of automobiles and quantities of Buick, Oldsmobile and Pontiac automobiles were manufactured in that state.

(d) At the petitioner's factory or plant in Maryland there were assembled Chevrolet automobiles for shipment to the District of Columbia and the surrounding states.

(e) At the petitioner's factory or plant in Delaware there were assembled Buick, Oldsmobile and Pontiac automobiles for shipment to the District of Columbia and the surrounding states.

3. (a) The petitioner in accordance with the statutes of the respective states filed income tax returns and paid income taxes for the taxable years involved as follows:

Year	State	Amount
1958	Delaware	$ 127,844.95
1957	Maryland	510,792.31
1958	Maryland	271,425.75
1957	Michigan	8,955,799.55
1958	Michigan	6,940,309.50

(b) A portion of the net income of petitioner derived from the segment of the petitioner's business consisting of the manufacture of products without, and sale within the District of Columbia was taxed by the above mentioned

states, pursuant to apportionment formulas (with factors of property, payroll and sales), as provided by their laws.

4. At a conference between the representatives of the petitioner and of the Finance Officer of the District of Columbia, after notice of the latter's intention to assess the deficiencies here involved, the representatives of the petitioner protested the contemplated assessment and stated that the apportionment made was out of all proportion to the business carried on in the District by the petitioner; and that the formula used was basically unfair because it did not take into consideration or employ factors which were important in the production of income from manufacturing; and suggested that factors other than sales should be employed in apportioning the income of the petitioner and suggested that the property and payroll factors should be considered.

5. The segment of petitioner's business which was conducted both within and without the District of Columbia consisted of the manufacture of a certain number of automobiles and kindred products without the District and the sale thereof to customers within the District. The net income from this segment of petitioner's business was earned by a series of transactions beginning with the manufacture of products in several states and ending with the sale to customers in the District. While the net income was not realized until sale, it was earned in part by manufacture of the products sold, including in addition to actual manufacture, procurement of material, financing, use of property and administration.

6. The method used by the assessing authority of the District attributed to the District 100 per centum of the net income derived by the petitioner from that segment of its business which consisted of the manufacture without, and sale of the products within the District. The percentage thus determined was out of all reasonable propor-

tion to the trade or business carried on or engaged in by petitioner within the District.

Opinion

The assessing authority of the District of Columbia assessed the petitioning taxpayer deficiencies in franchise tax and interest as follows: for the calendar year 1957 a deficiency of $268,585.40, plus interest of $35,879.40 or a total of $303,964.80; and for the calendar year 1958 a deficiency of $167,468.44, plus interest of $11,860.89 or a total of $179,329.33. The total amount of both deficiencies, $483,294.13, was paid by the petitioner. These appeals followed. The petitioner claims that the deficiencies and interest in their entirety were erroneously assessed. On the other hand, the respondent contends that they were validly assessed.

For the reasons hereafter stated the Court holds that deficiencies and interest for the two taxable years in the total amount of $317,049.83, were erroneously assessed against, and collected from the petitioner.

Before stating the reasons for the above holding, the Court will consider and dispose of the constitutional questions raised by the petitioner to the extent that it is empowered so to do.

I

CONSTITUTIONAL QUESTIONS

The petitioner has raised three constitutional questions, namely, that in violation of the Constitution (a) the application of the formula results in the taxation by the District of Columbia of values without its borders or taxing jurisdiction, (b) the provision of the statute which exempts or relieves from taxation those corporations or unincorporated businesses which have no office, warehouse or place of business in the District, while imposing a tax

on those who do have an office, warehouse or place of business in the District is unconstitutionally discriminatory, and (c) the attributing to the District of Columbia 100 per centum of the net income of the petitioner derived from that segment of its business, which consisted of the manufacture of products without, and sale thereof within the District, resulted in a tax out of all reasonable proportion to its business carried on or engaged in within the District. The Court does not believe it can decide those questions because of the muddled condition of the status of the Court, that is to say, whether it is a court or an administrative agency.

It is clear that Congress attempted to make the Board of Tax Appeals a court, or, at least, take away its administrative function as "*a constituent member of the assessing authority*" by the Act of July 10, 1952, (see third paragraph of Section 47-2402, D. C. Code, 1961 Edition). Such attempt, however, has been held to be abortive.

In *Hosmer* v. *District of Columbia*, 77 U. S. App. D.C. 295, 135 F. 2d 654, 71 W.L.R. 932, Judge Prettyman held that the then Board of Tax Appeals was not a court, but "*a constituent member of the assessing authority*". He held the same in *Hamilton National Bank* v. *District of Columbia*, 85 U.S. App. D.C. 109, 176 F.2d 624, 77 W.L.R. 1102. After those two decisions Congress attempted, at least, to negative or correct the effect of those decisions by providing in the Act of July 10, 1952, making the Board of Tax Appeals the "District of Columbia Tax Court", that "*the said District of Columbia Tax Court shall not be deemed or held to be a constituent member of the assessing or taxing authority of the District of Columbia*". In a recent case, *District of Columbia* v. *Brady*, 109 U.S. App. D.C. 324, 288 F. 2d 108, Judge Prettyman, however, held as follows:

"Moreover, under the Code, the ultimate exhaustion of the *administrative remedy*, *i.e.*, a decision by the Tax Court, an 'independent agency' in the District Government, or indeed even the filing of an appeal with that Court, precludes the taxpayer from filing suit under his common-law remedy. If the exhaustion of the *administrative remedy* is a bar to a common-law action *a fortiori* it can in no sense be a condition precedent to such a suit.

"We conclude that Dr. Brady's failure to exhaust his administrative remedy did not preclude his bringing action in the District Court.[2]"

The Tax Court of the United States is by the organic Act, a designated administrative agency.[3] In several cases in that Court it was held that it could decide constitutional questions, although serious doubts about that function have been expressed by some of the judges of that Court. This Court is, however, uncertain as to its power to decide a constitutional question and believes that until the matter is more clearly or definitely settled by the United States Court of Appeals or by a declaratory act of Congress, it should not decide the questions, but merely note, as it here does, that the constitutional questions were here raised. The Court, therefore, will decide the other issues presented under the law as it exists.

II

The Basis for Taxation

These cases involve franchise taxes imposed by Section 47-1571a[4] of the Code, which provides as follows:

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[2] It is interesting to note that the same result would have occurred from a holding that the Tax Court was a court and not an administrative agency.

[3] Actually it is a court. There is, and has been for sometime, a movement to have it declared to be a Federal Court.

[4] Section 2 of Title VII, D. C. Income and Franchise Tax Act of 1947.

"For the privilege of carrying on or engaging in any trade or business within the District and receiving income from sources within the District, there is hereby levied for each taxable year a tax at the rate of 5 per centum upon the taxable income of every corporation, whether domestic or foreign."

The question which the Court must answer is: what is the portion of the petitioner's net income that was fairly attributable to the trade or business carried on by it within the District of Columbia during the taxable years involved, 1957 and 1958, and other net income from sources within the District—within the meaning of that part of Section 47-1580[5] reading as follows:

"* * *. The measure of the franchise tax shall be that portion of the net income of the corporation * * * as is fairly attributable to any trade or business carried on or engaged in within the District and such[6] other net income as is derived from sources within the District; * * *."

The question presented in these cases relates solely to that segment of the petitioner's business which involves the manufacture of a certain number of automobiles and kindred products outside the District of Columbia and the sale thereof to customers within the District. To use the language of the many regulations, the trade or business contemplated by the Act is "the *manufacture and sale* or *purchase and sale* of tangible personal property". The Commissioners have correctly interpreted the term "trade or business" to include a combination of either "manufacture" *and* "sale" or of "purchase" *and* "sale". Otherwise, the regulations would have read "manufacture, purchase or sale". (See, among others, Section 10-2(c)(1)

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[5] Section 1 of Title X, ibid.

[6] The word "such", apparently was ineptly inserted. It has no meaning or significance.

(a), Regulations of August 6, 1953.) The regulations in the respect indicated are consonant with the legally established fact that, "income may be defined as the gain derived from capital, from labor, or from both combined" *Strattons Independence, Ltd.* v. *Howbert*, 231 U.S. 399, 415, 58 L. Ed. 285, 34 S. Ct. 136; *Doyle* v. *Mitchell Bros. Co.*, 247 U.S. 179, 185, 62 L. Ed. 1054, 38 S. Ct. 467; *Eisner* v. *Macomber*, 252 U.S. 189, 207, 64 L.Ed. 521, 40 S. Ct. 189. (And we might add "enterprise".) The cases, *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, 65 L. Ed. 165, 41 S. Ct. 45 and *Bass, Ratcliff and Gretton, Ltd.* v. *State Tax Com.*, 266 U.S. 271, 69 L. Ed. 282, 45 S. Ct. 82, have frequently been cited to support one factor formulas, and in that connection they will be discussed with other similar cases in a later portion of this opinion. At this point they are cited to show that the "trade or business" with which we are here concerned includes both the manufacturing as well as the selling of the merchandise involved; that the net income therefrom is earned by both activities;[7] and that, while net income is not "*realized*" until sale, it is earned in part by the manufacture of the article sold. In the *Underwood Typewriter Co.*, case (254 U.S. at page 120) is the following:

> "The profits of the corporation[8] were largely earned by a series of transactions beginning with manufacturing in Connecticut and ending with sale in other states."

Likewise in the *Bass, Ratcliff & Gretton* case (266 U.S. at page 282) we find this:

> "So in the present case we are of opinion that as the Company carried on the unitary business of manufacturing and selling ale, in which its profits were *earned* by a series of transactions beginning

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[7] Together, of course, with administrative activities.

[8] Similar to the petitioner herein.

with the manufacture in England and ending in sales in New York and other places—the process of manufacturing *resulting* in no profit until it ends in sale, etc." (Emphasis supplied.)

And as the Supreme Court said in *Hans Rees' Sons* v. *North Carolina*, 283 U.S. 123, 75 L. Ed. 879, 51 S. Ct. 385:

> "Undoubtedly the enterprise of a corporation which manufactures and sells its manufactured product is ordinarily a unitary business, and all the factors in that enterprise are essential to the realization of profits."

III

Regulation and Formula Must Comply With Law

At the outset it should be pointed out that, *legally*, any formula or method for the apportionment or determination of net income taxable by the District must, in respect of multistate businesses, accord with that part of Section 47-1580a[9] of the Code, which is in this language:

> "* * *. If the trade or business of any corporation * * * is carried on or engaged in both within and without the District, the net income derived therefrom shall, for the purposes of this article be deemed to be income from sources *within* and *without* the District. * * *." (Emphasis supplied.)

In *McCeney* v. *District of Columbia*,[10] 97 U.S. App. D.C. 282, 285, 230 F. 2d 832, 84 W.L.R. 625, Judge Washington, commenting on the failure of the Commissioners to follow the statute in promulgating regulations, said:

> "Section 47-1601 is explicit that the tax is to be paid on the 'market value' of the interest involved.

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[9] Section 2 of Title X, District of Columbia Income and Franchise Tax Act of 1947.

[10] Involved an inheritance tax.

> This requires, we think, that the actual market value of the interest be determined as nearly as possible. Although Section 47-1607 provides that the value of remainder interest is to be determined by subtracting from the value of the property the value of the life interests, determined in such manner as the Commissioners' regulations prescribe, *this does not authorize the Commissioners to adopt regulations which result in disregarding the directive of the statute to tax only the market value of the interest. It is axiomatic that administrative rules must be consistent with the statute under which they are promulgated.*" (Emphasis supplied.)

See also: *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134, 80 L. Ed. 528, 56 S. Ct. 397; *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 616, 88 L.Ed. 1488, 64 S.Ct. 1215; *Thompson* v. *Amalgamated Casualty Ins. Co.*, 207 F. 2d 214, 220.

Any formula or method which does not conform to, or comply with the plain and unambiguous directive or mandate of the law is, therefore, not legally permissible. For instance, if a corporation manufactures its products at its only plant in Maryland and sells them in the District, a formula with sales as the *sole* factor would be illegal, because under it the entire net income would be assigned to, or deemed to be from sources within the District. Likewise, if property be the sole factor, the formula would be legally improper, because all of the net income would be thereunder assigned to, or deemed to be from sources in Maryland.

It is interesting to note that, if the taxpayer has its office, manufacturing plant or other principal place of business in the District and sells some of its products or performs some of its services without as well as within the District, a formula with one factor of sales only does not necessarily violate the *letter* of the provision of the law that the income must be deemed to be from sources

both within and without the District. Examples of that result are *District of Columbia* v. *Southern Railway Co.*, 107 U.S. App. D.C. 285, 277 F. 2d 84, 88 W.L.R. 277; *District of Columbia* v. *Evening Star Newspaper Co.*, 106 U.S. App. D.C. 360, 273 F. 2d 95, 87 W.L.R. 1371; and *Thompson's Dairy, Inc.* v. *District of Columbia*, D.C.T.C., Docket Nos. 1731 and 1733, Opinion No. 988. In those cases a one factor formula was used, but its use resulted in loss of revenue to the District to which it was economically entitled from the use by the taxpayers of property and administrative services within the District. A formula with the factors of property, payroll and sales would have saved that revenue, which no doubt, is why the Finance Officer of the District has repeatedly requested and urged the Commissioners to adopt the three factor formula for consistent use, that is to say, for the taxation of both resident and nonresident taxpayers.[11]

It should, moreover, be observed at this point that the provision for regulations apply in the statute to instances only where the net income of the taxpayer is "deemed to be income from sources within and without the District". Section 47-1580a of the Code, in part, provides:

> "Where the net income of a corporation or unincorporated business is derived from sources both within and without the District,[12] the portion thereof subject to tax under this article *shall* be determined under regulation or regulations prescribed by the Commissioners." (Emphasis supplied.)

Apparently, where the business is carried on *solely* in the District and the entire net income arises therein regu-

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[11] Formal submission of the three factor formula to the Commissioners and action thereon will appear from the Appendices A, B, and C to this opinion.

[12] That is to say, when the business is carried on within and without the District. See preceding portion of Section 47-1580a of the Code.

lations or formulae are not necessary. They are only needed where the income is to be deemed to be from sources *both within* and *without* the District.

There are two suggestions or insinuations that need comment. The first is that, if all of a corporation's products manufactured outside the District are not sold therein, a one factor formula of sales would meet the requirement of the law, since it could be said that a part of the net income from the (entire) business of the corporation is deemed to be from sources without the District. The fallacy of that idea is due to overlooking the fact that the "trade or business" covered by the act is that relating to the District, which is a combination of "manufacturing and selling" and which is carried on in the manner stated in the *Underwood Typewriter Co.*, and *Bass, Ratcliff & Gretton* cases, above cited, both within and without the District. To use an extreme case as the acid test, in *Smoot Sand & Gravel Co.* v. *District of Columbia*, 104 U.S. App. D. C. 292, 261 F. 2d 758, 85 W.L.R. 1078, all of the taxpayer's products were manufactured or processed without the District. Ninety-five per centum was sold in the District, and that percentage of its net income was held to be taxable by the District [13] under a one factor formula of sales. If all of the products had been sold, one hundred per centum of its income would have been held taxable by the District under that formula.

The other suggestion is that since *net* income results from the deduction from *gross* income of all expenses, including those relating to manufacturing, the requirement for the apportioning of net income within and without the

[13] The U. S. Court of Appeals evidently overlooked the mandate of the statute as to apportioning the income within and without the District, or it may have been influenced by the fact that Smoot Sand & Gravel Company had its principal office in the District where all of its fiscal affairs were handled. Two-thirds, however, of its expenses were incurred in Maryland and Virginia.

District, where the business is carried on both within and without the District, is met by reason of such deduction. That suggestion, in the first place, overlooks the fact that all expenses, including that relating to selling the products, are deducted. Moreover, what we are trying to do in these types of cases is to find the locale of the commercial activity and what portion of the net income is fairly attributable thereto. The usual computation of net income involving the inclusion of items in gross income and deducting items of expense therefrom is not here involved. For practical purposes what is important in cases of this kind is the determination of what portion of net income results from the use of property, from the activities of administration and the like and from the process of selling.

For the reasons stated the Court does not believe that a one factor formula of sales can, consistent with the Act, be used where, as here, the trade or business involved is the manufacture of tangible personal property without, and the sale thereof within the District.

IV

The Eastman Kodak Company and the Panitz Cases

A great deal of confusion has arisen concerning a case decided some years ago by the United States Court of Appeals under the old District of Columbia Revenue Act of 1939, namely *Eastman Kodak Co.* v. *District of Columbia*, 76 U.S. App. D.C. 339, 131 F. 2d 347. In that case this Court, then the Board of Tax Appeals, upheld an income tax against Eastman Kodak Company on the entire net income from sales of its products in the District of Columbia. The amount of net income allotted to the District was computed by assigning to the District that proportion of the taxpayer's income as sales in the District bore to sales everywhere. The United States Court

of Appeals affirmed that holding. Several things must be kept in mind in relation to the *Eastman Kodak Company* case and to these cases. They arose under two differing statutes namely, the District of Columbia Revenue Act of 1939, and the District of Columbia Income and Franchise Tax Act of 1947, respectively. The taxes imposed on corporations by the two acts are different in several important and essential respects. *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 55 L. Ed. 389, 31 S. Ct. 342. The former imposed, as far as corporations were concerned, a pure income tax, while the latter levies a privilege tax, measured, it is true, by net income. The *Eastman Kodak Company* case was decided, certainly in this Court, on the severance theory, that is to say, that no income was earned until the property involved was sold—that "the fruit must be shaken from the tree", to speak figuratively; and that the place wherein the sale took place was where the income was realized. This Court and the Court of Appeals relied upon several Federal cases which were decided before the enactment of Section 119(c) of the Internal Revenue Code of 1939 (February 10, 1939).[14] The Federal law, as it existed earlier, and upon which those cases were based, was essentially the same as the District of Columbia Revenue Act of 1939. Section 119(c) of the Internal Revenue Code of 1939, however, materially changed the Federal law; and provided that income "from the sale of personal property produced (in whole or in part) by the taxpayer within and sold without the United States, *or produced (in whole or in part) by the taxpayer without and sold within the United States, shall be treated as derived partly from sources within and partly from sources without the United States*", which is substantially what that part of Section 47-1580a quoted above provides, *as far as this case is concerned*, that is to say, involving the manufacture of personal property *without*, and its

[14] See the cases cited in Footnote 6, 76 U.S. App. D.C. page 340.

sale *within* the District. It is interesting to note that Eastman Kodak Company sought to have the United States Court of Appeals determine the question of tax liability on the basis of the then new Section 119(c) of the Internal Revenue Code of 1939, but that Court refused to do so and as stated above affirmed the above mentioned decision of this Court.

It should here be noted that the most important, and indeed, controlling difference between the District law involved in the *Eastman Kodak Company* case and the District of Columbia Income and Franchise Tax Act of 1947 is that the former law did not, as does the latter (Section 47-1580a of the Code) provide that where the taxpayer's business is carried on within and without the District the net income, for the purpose of measuring the tax, must be deemed to be from sources *within* and *without* the District. Another difference between the 1939 and 1947 District laws is that under the former, since the income was earned where the sale was made, the passing of title, which usually completes a sale of personal property, was determinative, while under the latter the passing of title is of no determinative effect, which was due to, or came about by the following. The decision in the *Eastman Kodak Company* case in favor of the District was a Pyrrhic Victory. The manufacturers quickly adopted a plan whereby title and possession of goods shipped from points outside to customers within the District passed to the customers at a point outside the District. The United States Court of Appeals in *Electric Storage Battery Co. v. District of Columbia*, 81 U.S. App. D.C. 135, 155 F. 2d 867, set aside a District of Columbia income tax where the title to goods in a f.o.b. shipment passed to the customer outside the District. That and other cases, and the effect of the *Eastman Kodak Company* case and its use by the manufacturers resulted in the promotion by the District of the enactment of the District of Columbia

Income and Franchise Tax Act of 1947,[15] which, as far as corporations and unincorporated businesses are concerned, has two principal advantages to the District, namely, nullification of the effect of the passing of title and the elasticity of a franchise tax which could be measured by income attributable to business carried on in the District, regardless of the locale of the sale or the real source of income in the concept of pure income taxation. Congress did, however, as above observed, provide, as protection for multistate businesses, that where the business was carried on both within and without the District the net income from such business had to be considered income from sources without, as well as within the District.

Panitz v. *District of Columbia*, 74 U.S. App. D.C. 284, 122 F. 2d 61, 69 W.L.R. 891, has been frequently cited in support of a one factor formula of sales. Like the *Eastman Kodak Company* case, the law involved in the *Panitz* case was materially different from the Income and Franchise Tax Act,—even more so. The *Panitz* case arose under the old Business Privilege Tax Act in the District of Columbia Revenue Act of 1937. It simply imposed an excise tax measured by gross receipts from business carried on in the District "without any deduction therefrom on account of the cost of the property sold, the cost of materials, labor or services or other costs * * * or any expense whatsoever". All that was there decided was that a tax on the gross receipts from the commercial activity of sales (as required by the law) in the District was proper. There was no provision in the taxing statute requiring any apportionment, as does the present law, nor any provision similar in the slightest degree to the requirement in the current Act that, if the business is carried on both within and without the District, the net income must be apportioned accordingly.

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[15] Chapter 15 of Title 47, D.C. Code, 1951 Edition.

The provision in Section 47-1580a of the Code providing that, if the trade or business is carried on within and without the District of Columbia, the net income must be deemed to be income from sources without, as well as within the District, has not only been ignored in the regulations, but has received no comment by counsel for the District in their brief in this case, although this Court has repeatedly referred to that provision as not only important, but controlling as well. The Court is at a loss to understand the failure on the part of counsel to discuss the provision in relation to these cases and to the facts stipulated by the parties.

V

Other Cases Cited To Support A One Factor Formula

Several Supreme Court cases have frequently been cited to support a one factor formula in the taxation of net income or gross receipts from unitary businesses or corporations. The cases do support the use of such a formula, *if the particular statute so provides.* In none of the cases did the taxing statute provide, as does the District law, for the apportionment within and without the taxing jurisdiction where the business is carried on within and without that area. The cases, briefly discussed, are the following:

Maine v. *Grand Trunk Rwy. Co.*, 142 U.S. 217, 35 L. Ed. 994, 12 S. Ct. 121. Really not an apportionment case. The method to be used was specifically spelled out in the Maine statute.

Underwood Typewriter Co. v. *Chamberlain, supra.* Unlike or exactly opposite from the District statute, the Connecticut law specifically provided that, if the business was carried on both within and without the State, the tax should be computed by the use of a one factor formula of property within Connecticut.

Bass, Ratcliff & Gretton, Ltd. v. *State Tax Commission, supra.* The taxing statute provided specifically for a one factor formula of real and personal property in New York.

National Leather Co. v. *Massachusetts,* 277 U.S. 413, 72 L. Ed. 935, 48 S. Ct. 534. Taxing statute specifically provided for use of a one factor formula of real and personal property employed in business in Massachusetts.

It should be added that in respect of the *Underwood Typewriter Co., Bass, Ratcliff & Gretton, Ltd.* and *National Leather Co.* cases the Supreme Court in the *Hans Rees' Sons* v. *North Carolina, supra,* indicated, as did our Court of Appeals in *Smoot Sand & Gravel Co.* v. *District of Columbia, supra,* that the decisions sustaining the one factor formulas turned largely upon the failure of evidence. This is what the Supreme Court said in the *Hans Rees' Sons* case.

> "* * * Evidence which was found lacking in the Underwood and Bass Cases is present here. *These decisions are not authority for the conclusion that, where a corporation manufactures in one state and sells in another, the net profits of the entire transaction, as a unitary enterprise, may be attributed, regardless of evidence, to either state.* In the Underwood Case, it was *not* decided that the entire net profits of the total business were to be allocated to Connecticut because that was the place of manufacture, or, in the Bass Case, that the entire net profits were to be allocated to New York because that was the place where sales were made. In both instances, a method of apportionment was involved which, as was said in the Underwood Case, 'for all that appears in this record, reached, and was meant to reach, only the profits earned within the state.' The difficulty with the evidence offered in the Underwood Case was that it failed to establish that the amount of net income with which the corporation was

charged in Connecticut under the method adopted was not reasonably attributable to the processes conducted within the borders of that state; and in the Bass Case the Court found a similar defect in proof with respect to the transactions in New York." (Emphasis supplied.)

New York v. *Latrobe*, 279 U.S. 421, 73 L. Ed. 776, 49 S. Ct. 377. Unlike the District law, the New York statute specifically provided that the license fee for a corporation be based upon that proportion of its corporate stock that gross assets employed within the state bore to its gross assets employed everywhere. *It was a corporate stock valuation case.*

Ford Motor Co. v. *Beauchamp*, 308 U.S. 331, 48 L. Ed. 304, 60 S. Ct. 273. Unlike the District statute, Texas Annotated Civil Statute, Article 7084 specifically imposed "a franchise tax * * * based upon that proportion of the outstanding capital stock, surplus and undivided profits, plus the amount of outstanding bonds, notes and debentures, other than those maturing less than a year from date of issue, as gross receipts from its business done in Texas bears to the total gross receipts of the corporation from its entire business, * * *."

International Harvester Co. v. *Evatt*, 329 U.S. 416, 91 L. Ed. 390, 67 S. Ct. 444. The Ohio statute specifically provided the formula to be used. Incidentally, the Ohio statute provided a *two* factor formula, namely, of property and "business done" in Ohio.

Actually, all that the foregoing Supreme Court cases decided was that the use of the formulas specifically provided in the various statutes did not violate the Constitution.

A state case, *Household Finance Co.* v. *State Tax Com.*, 212 Md. 80, 128 A. 2d 640, relied upon to support the use of a one factor formula should be briefly discussed. That

case really supports the principle that, if business is carried on within and without the District the net income must be deemed income within and without the District. The Maryland statute required the State Tax Commission, in the valuation of corporate stock relating to Maryland, to exclude business and property outside the state. The order of the State Tax Commission did not follow the law. On appeal to the Court of Appeals of Maryland the order of the Commission was modified to comply with the law. Moreover, a statutory formula or method was provided.

VI

The Gallant Case

District of Columbia v. *Gallant, Incorporated,* U.S. App. D.C. , 290 F. 2d 745, dealt with a regulation adopted by the Commissioners on August 6, 1953, for the enforcement and administration of the foregoing provisions of the Income and Franchise Tax Act.[16] The portion of the regulation with which we are here concerned is Section 10-2(c). The first sentence comports with the Act. It is the following:

> "If the trade or business is carried on or engaged in *wholly* within the District, the entire net income from trade or business shall be *allocated* to the District." (Emphasis supplied.)

The next portion of the regulation, Subsection (1)(a) of Section 10-2(c), attempts to prescribe, or has for its sole purpose the prescribing of a formula for the determination of the net income taxable by the District, that is to say, "*fairly* attributable" to any trade or business carried on in the District. The United States Court of Appeals in the *Gallant* case held that the subsection was *valid*, but that it failed in its purpose, or, to use the language in

[16] Chapter 15 of Title 47, D.C. Code, 1951 Edition.

the opinion, "failed to provide a 'formula' as the term is ordinarily understood in the regulation". Later in the opinion is found this language (290 F. 2d at page 748):

> "However, irrespective of the authority of the Assessor, the Tax Court itself cannot be precluded, for lack of a regulatory formula, from determining the income which is fairly apportionable to the District. Cf. *McCeney* v. *District of Columbia*, 97 U.S. App. D.C. 282, 230 F. 2d 832 (1956). The Tax Court is, under Section 47-2403, to hear and determine 'all questions arising' on the appeal—here the question of what income is fairly attributable to the District —and it may 'reduce or increase' the assessment as required under its determination of such questions.
>
> "The case is remanded to the Tax Court for further proceedings not inconsistent with this opinion. The Tax Court is directed to determine the amount of the income which is fairly attributable to the District by applying the August 6, 1953, regulations, including if necessary the use of such formula or formulae as the Tax Court deems best suited for determination of that question in this case. * * *."

In Footnote numbered 4, relating to the regulation of August 6, 1953, is the following: "If a valid and pertinent regulation is promulgated by the Commissioners, the Tax Court must obey it and properly apply it." It is not supposed that the Court of Appeals meant that any regulation adopted by the Commissioners relating to the subject matter here involved should be given retroactive effect in face of the well established principle that such cannot be done if, as decided in the *Gallant* case, there was a valid regulation in effect during the prior year. *District of Columbia* v. *Radio Corporation of America*, 98 U.S. App. D.C. 119, 232 F. 2d 376, 84 W.L.R. 918, cert. denied, 352 U.S. 845, 1 L. Ed. 2d 51, 77 S. Ct. 44. But assuming that the United States Court of Appeals might have intended an exception or relaxation of the rule and

intended that any new regulation be given retroactive effect, as was assumed in this Court's Memorandum on Remand in the *Gallant* case, this Court is of the opinion that, for the reasons stated in that memorandum, to which reference is here made to avoid repetition, the regulation adopted by the Commissioners on July 14, 1961, purporting to relate or pertain to the foregoing provisions of the Income and Franchise Tax Act (See Sections 47-1580 and 47-1580a of the Code) is invalid. The principal objection to the July 14, 1961, regulation is that to apply it in this case to the trade or business involved would violate the plain and unambiguous provision of Section 47-1580a of the Code that "If the trade or business of any corporation * * * is carried on or engaged in both within and without the District, the net income derived therefrom shall, for the purposes of this article, be deemed to be income from sources within and without[17] the District." The Court is of the opinion, therefore, that the use of the July 14, 1961, regulation in this case would be improper.

VII

The Best Suited Formula

In the light of the *Gallant* case, the Court believes that it is its duty to determine the amount of net income that was fairly attributable to the District of Columbia within the meaning of Section 47-1580 and 47-1580a of the Code, and to use such formula or formulae as will be agreeable to, and not violative of any provisions of those sections. This Court assumes, of course, that the United States Court of Appeals requires that in adopting a formula this

[17] It is important to note that the use of the phrase *"within and without the District"* shows that the term "trade or business" includes that which is done without as well as within the District, otherwise the provision would be meaningless or at least, unnecessary, since there would never be any occasion for its use.

Court follow all pertinent provisions of the taxing statute. With that in mind and considering the nature and extent of the trade or business carried on by the petitioner in relation to the District, that is to say, the manufacture of a certain quantity of products and administrative activities without the District and the sale of those products within the District, the Court is of the opinion that a formula is necessary for the determination of the portion of petitioner's net income which was fairly attributable to business carried on within the District within the meaning of Section 47-1580 and 47-1580a of the Code; and that the formula best suited for that determination is the following:

> The portion of petitioner's net income fairly attributable to the trade or business carried on or engaged in within the District of Columbia by the petitioner during the taxable years 1957 and 1958 shall be determined by multiplying its total net income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three.
>
> 1(a) The property factor is a fraction, the numerator of which is the average value of the petitioner's real and tangible personal property owned or rented and used by the petitioner in the District during the taxable year, except property from which petitioner derived net income subject to direct allocation under the regulations pertaining to the District of Columbia Income and Franchise Tax Act of 1947,[18] and the denominator of which is the average value of all the

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[18] For example, real estate rented to tenants, the rents therefrom being "such other income as is derived from sources within the District", within the meaning of Sections 47-1580 and 47-1580a of the Code, the net income from which is taxable separately from that derived from "trade or business". *D. C.* v. *Evening Star Newspaper Co.*, 106 U.S. App. D.C. 360, 273 F. 2d 95, 87 W.L.R. 1371.

petitioner's real and tangible personal property owned or rented and used during the taxable year.

(b) Property owned by the petitioner is valued at its original cost. Property rented by the petitioner is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the petitioner, less any annual rental rate received by it from sub-rentals.

(c) The average value of property shall be determined by averaging the value at the beginning and ending of the taxable year.

2(a) The payroll factor is a fraction, the numerator of which is the total amount paid in the District during the taxable year by the petitioner for compensation, and the denominator of which is the total compensation paid everywhere during the taxable year.

(b) Compensation is paid in the District, if:

(i) The individual's service is performed entirely within the District.

(ii) The individual's service is performed both within and without the District, but the service performed without the District is incidental to the individual's service within the District, or

(iii) Some of the service is performed in the District and (1) the base of operations, or, if there is no base of operations, the place from which the service is directed or controlled is in the District, or (2) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in the District.

3(a) The sales factor is a fraction, the numerator of which is the total sales by the petitioner in the District during the taxable year, and the denomina-

tor of which is the total sales by the petitioner everywhere during the taxable year.

(b) Sales of tangible personal property are in the District if:

(i) The property is delivered or shipped to a purchaser, including the United States, within the District of Columbia, regardless of the f.o.b. point or other conditions of the sale.

The foregoing formula is, incidentally, substantially similar to the formula provided for multi-state businesses in the Uniform Division of Income for Tax Purposes Act,[19] and to that recommended by the Finance Officer to the Commissioners in a memorandum dated March 22, 1961, and tentatively approved by the Commissioners on March 30, 1961 (See Appendices "A", "B" and "C" to this opinion). The formula, however, is adopted, because, in the opinion of the Court, it is intrinsically the best suited under the facts and in view of the nature of the trade or business involved herein.

The parties have stipulated facts sufficient for the application of the foregoing formula.

The Court has not overlooked the decision in the *Gallant* case that the regulation providing a one factor formula of sales is valid in that case. That decision, however, must be considered in the light of the circumstances in that case, that is to say, that the taxpayer, Gallant Incorporated, was engaged primarily in "the purchase and sale", and *not* "the manufacture and sale", with its principal office in the District, and sold the tangible personal property involved in that case *within* and *without* the District, which permitted the use of the sales factor only, without violating the *letter* of the directive in the Act that the

[19] Approved, 1957, by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association.

income had to be treated as earned, or from sources within and without the District, which would not be true in this case where the products involved were manufactured without but *sold* within the District. The use of the one factor formula in the *Gallant* case did deprive the District of Columbia of some revenue, but not all, so that, strictly speaking as observed above, the formula did not violate the letter of the law. The same is true of the *Southern Railway Co.*, *Evening Star Newspaper Co.* and *Thompson's Dairy, Inc.*, cases.

VIII

Computation of Taxes and Interest Due

Year 1957

The factors of property, payroll and sales as defined in the formula may be stated as follows:

	Everywhere	District of Columbia	District Percentage
Property [20]	$6,247,160,370	$ 1,360,676	.0218%
Payroll	$2,662,072,037	$ 1,268,180	.0477%
Sales	$9,461,855,874	$37,185,704	.3930%
Combined Percentages			.4625%
Total Percentages divided by 3 (average)			.1542%

The portion of petitioner's net income for 1957 fairly attributable to the business of manufacturing and selling its products carried on within the District is computed as follows:

[20] The item of "Property" includes both owned and rented property, the latter valued at 8 times the annual rent paid by petitioner.

Total Net Income	$1,312,092,839.00
Three Factor Apportionment Percentage	.1542%
Net Income Apportioned to District	$ 2,023,247.00
Plus Other Net Income from Sources in the District	10,320.00
Total Net Income Taxable by District	2,033,567.00
Rate of Tax	5%
Tax Due by Petitioner	101,162.25
Interest from 4/15/58 to 5/20/60 at ½ of 1% per month [21]	13,151.25
Total Tax and Interest Due for 1957	$ 114,313.50

YEAR 1958

The factors of property, payroll and sales as defined in the formula may be stated as follows:

	Everywhere	District of Columbia	District Percentage
Property	$6,403,673,576	$ 1,326,209	.0207%
Payroll	$2,354,049,741	$ 1,233,787	.0524%
Sales	$7,853,393,381	$32,542,519	.4144%
Total Percentages			.4875%
Total Percentages divided by 3 (average)			.1625%

The portion of the petitioner's net income for 1958 fairly attributable to business carried on within the District of Columbia by the petitioner is computed as follows:

[21] Section 47-1589c(b), D.C. Code, 1951 Edition, Supplement VIII, providing for interest on interest does not apply, because the amount assessed and demanded was exorbitant.

Total Net Income	$653,396,893.00	
Three Factor Apportionment Percentage		.1625%
Net Income Apportioned to District	$	1,061,769.00
Plus Other Net Income from Sources in the District		15,418.00
Total Net Income Taxable by District		1,077,187.00
Rate of Tax		5%
Tax Due by Petitioner		53,859.35
Interest from 4/15/59 to 5/20/60 at ½ of 1% per month [22]	$	3,770.15
Total Tax and Interest Due for 1958	$	57,629.50

[22] Section 47-1589c(b), D.C. Code, 1951 Edition, Supplement VIII, providing for interest on interest does not apply because the amount demanded in the assessment was exorbitant.

IX

COMPUTATION OF REFUND

YEAR 1957

The amount of franchise tax and interest for the year 1957 to be refunded to the petitioner is computed as follows:

	Tax	Interest	Total
Originally and Voluntarily paid by Petitioner	$ 4,198.70	None	$ 4,198.70
Deficiency paid by Petitioner	268,585.40	$35,379.40	303,964.80
Total paid by Petitioner	$272,784.10	$35,379.40	$308,163.50
Amount due by Petitioner	101,162.25	13,151.25	114,313.50
Refund payable to Petitioner	$171,621.85	$22,228.15	$193,850.00

YEAR 1958

The amount of franchise tax and interest for the year 1958 to be refunded to the petitioner is computed as follows:

	Tax	Interest	Total
Originally and Voluntarily paid by Petitioner	$ 1,500.00	None	$ 1,500.00
Deficiency paid by Petitioner	167,468.44	$11,860.89	179,329.33
Total paid by Petitioner	$168,968.44	$11,860.89	$180,829.33
Amount due by Petitioner	53,859.35	3,770.15	57,629.50
Refund payable to Petitioner	$115,109.09	$ 8,090.74	$123,199.83

X

CONCLUSION

For the reasons hereinbefore stated the Court holds as follows:

Docket No. 1698. That a deficiency in franchise tax for the calendar year 1957 in the amount of $171,621.85, and interest thereon in the amount of $22,228.15, or a total of $193,850.00, were erroneously assessed against and collected by the respondent from the petitioner; and that the petitioner is entitled to a refund thereof with interest thereon at the rate of 4 per centum per annum from May 20, 1960, to the date of the payment of the refund.

Docket No. 1699. That a deficiency in franchise tax for the calendar year 1958 in the amount of $115,109.09, and interest in the amount of $8,090.74, or a total of $123,199.83, were erroneously assessed against, and collected by the respondent from the petitioner; and that the petitioner is entitled to a refund thereof with interest thereon at the rate of 4 per centum per annum from May 20, 1960, to the date of the payment of the refund.

Decisions will be entered for petitioner.

[signed] Jo. V. Morgan
Jo. V. MORGAN,
Judge

[APPENDIX "A" TO OPINION]

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF GENERAL ADMINISTRATION
FINANCE OFFICE

March 22, 1961

MEMORANDUM TO THE COMMISSIONERS, D. C.
(Through the Director of General Administration)

SUBJECT:

Proposed amendment to the Income and Franchise Tax Regulations implementing the District of Columbia Income and Franchise Tax Act of 1947, as amended.

It is recommended that the Commissioners approve the attached proposed amendment to Subsection 10.2-(c)(1) of the Regulations pertaining to the District of Columbia Income and Franchise Tax Act of 1947, as amended. Subsection (1) of Section 10.2-(c) relates specifically to the methods to be employed in determining the portion of net income to be apportioned to the District in the case of a corporation or unincorporated business deriving income from sales of tangible personal property both within and without the District.

The District of Columbia Income and Franchise Tax Act of 1947, as amended, imposes a tax upon the taxable income of every corporation and unincorporated business, whether domestic or foreign (unless expressly exempt under the Act), for the privilege of carrying on or engaging in any trade or business in the District and of receiving income from sources within the District. "Taxable income" is defined in the Act to mean "the amount of net income derived from sources within the District within the meaning of Title X" of the Act.

Section 2 of Title X of the Act provides, in pertinent part, as follows:

> "Where the net income of corporation or unincorporated business is derived from sources both within and without the District, the portion thereof subject to tax under this article shall be determined under regulation or regulations prescribed by the Commissioners."

The present sales regulation was promulgated by the Commissioners in 1953 and provides for apportioning the net income of corporations engaged in selling tangible personal property both within and without the District in the ratio that District sales bear to sales everywhere. The present regulation defines the phrase "District sales" to mean:

> "* * * all sales to District customers the income from which is fairly attributable to the trade or business carried on or engaged in within the District, including solicitation in the District by salesmen or other representatives of the taxpayer, that portion of sales to customers outside the District the income from which is fairly attributable to the trade or business carried on in the District, and sales of tangible personal property the income from which is from District sources."

The foregoing regulation has been found to be both inequitable and unworkable not only at the administrative level but by the District of Columbia Tax Court. In *Smoot Sand and Gravel Corp.* v. *District of Columbia*, D.C.T.C. Docket No. 1340, decided September 4, 1957, the District of Columbia Tax Court, speaking of the present sales regulation, stated:

> "It will be noticed that the formula attempts to deal with three situations. The first involves sales to customers within the District of Columbia, the income

from which is 'fairly attributable etc.,' the second, to customers *outside* the District, the income from which is 'fairly attributable etc.,' and the third, 'sales of tangible personal property the income from which is from District sources.' When it is considered that the stated purpose of the formula is to determine what is 'fairly attributable to trade or business', and what is 'derived from sources in the District' the formula is meaningless. It is like saying 'fairly attributable' income is 'fairly attributable' income, and income derived from District sources is income derived from District sources.'

> And Lo! The Phanton Caravan has reached
> The Nothing it set out from—.

"There is no standard, no test, no yardstick, as in the earlier regulations, by which it may be determined what business activity will produce income that can be said to be 'fairly attributable to any trade or business' in the District. The provision in the regulation that 'District sales' include 'solicitation in the District by salesman or other representatives of the taxpayer' does not cure the defect, since there are many other activities connected with, or related to sales."

In a series of cases following the foregoing decision, the District of Columbia Tax Court has consistently refused to apply the present regulation. Needless to say, it has become virtually impossible to deal with taxpayers such as General Motors Corporation, General Foods Corporation, the Lever Brothers Company, Radio Corporation of America, Ford Motor Company, and every other corporation, large and small alike, in the face of the position taken by the Tax Court and the resulting nebulous status of the present sales regulation.

On February 7, 1961 there was forwarded to the Commissioners, D. C., through the Director of General Ad-

ministration, a proposed amendment to Section 10.2-(c) of the Income and Franchise Tax Regulations. That amendment contained, *inter alia*, a new three-factor formula, composed of property, payroll and receipts, for apportioning to the District a fair and reasonable portion of the net income of service-type businesses which operate both within and without the District. What we said there concerning the use of a three-factor formula as opposed to a single-factor formula is equally applicable herein. Suffice to say that a three-factor formula consisting of property, payroll and sales is the most accurate and equitable method yet devised for apportioning among the States the taxable net income of corporations operating in a number of States. In cases involving questions of apportionment of income of multistate businesses, the Supreme Court of the United States has stated many times that arithmetical accuracy is not possible in this difficult area of taxation, and mathematical precision is not required.

The three-factor formula set forth in the proposed amendment has been enacted or recommended for enactment, in whole or in part, by some twenty States, and is gaining widespread recognition as the most effective and accurate method yet conceived for apportioning business income among the several taxing jurisdictions. It has been endorsed for use by all of the States, on a uniform basis, by most, if not all, of the major associations of State assessors and tax administrators, and by the House of Delegates of the American Bar Association.

While it is not possible to estimate with any degree of accuracy the revenue effects of the adoption of the proposed three-factor formula, its adoption will bring about some decrease in revenue. This decrease in revenue will be offset to some extent by the increase in revenue anticipated from the adoption and application of the three-factor formula relating to service-type business. Also, it

is believed that the adoption of the three-factor formula contained in the proposed amendment will produce certain tangible and intangible economic benefits. Corporations have been moving their offices from the District at an alarming rate over the past several years chiefly, we believe, in an effort to avoid liability for payment of District corporation franchise taxes. It is believed that most of the corporations which have removed their offices from the District have done so because of the inequitable results flowing from the application of the present single-factor sales formula, and would not have done so if the District had had in effect a three-factor formula for measuring the amount of their taxable income to be apportioned to the District. If by the adoption of the proposed amendment large corporations can be persuaded to remain in the District, or to move their offices into the District, it follows that the District will benefit therefrom not only tax-wise, but in many ways. The whole economy of the District would be revitalized, and a dangerous trend would have been stemmed. In addition, several states which anticipated a loss of revenue prior to the adoption by them of such a three-factor formula have reported that such loss was not in fact incurred.

Under the proposed amendment the property and payroll factors for sales corporations are, with one minor exception, the same as the property and payroll factors for service-type corporations. Generally, the sales factor attributes to the District all sales of tangible personal property delivered or shipped to a purchaser within the District. Sales of tangible personal property to the United States Government are separately considered in accordance with the provisions of the Act relating to such sales.

It is imperative for the proper enforcement of the Income and Franchise Tax Act that the present regulation pertaining to sales corporations be amended. Since the District of Columbia Tax Court refuses to apply the pres-

ent regulation, the Finance Office has been placed in an untenable position in its dealings with corporate taxpayers. It is believed that the proposed three-factor formula comes as near to complete equity as is possible in this complex area of taxation.

It is recommended that the attached proposed amendment to Section 10.2-(c) of the Income and Franchise Tax Regulations be referred to the Corporation Counsel for technical legal review with instructions to incorporate this proposed amendment to Section 10.2-(c) of the Regulations with the proposed amendment to Section 10.2(c), which was forwarded to the Commissioners on February 7, 1961. It is further recommended that, after review by the Corporation Counsel, a public hearing be held on the proposed amendments after which, with such changes as may appear necessary, the attached proposed amendment be approved by the Commissioners to become effective January 1, 1962.

Finance Officer

Approval recommended:

Director of General Administration

[APPENDIX "B" TO OPINION]

PROPOSED AMENDMENT TO SECTION 10.2-(c)(1) OF THE REGULATIONS PERTAINING TO THE DISTRICT OF COLUMBIA INCOME AND FRANCHISE TAX ACT OF 1947, AS AMENDED.

(8) Where income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be determined by multiplying the total

net income from such trade or business by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three.

(a) The property factor is a fraction, the numerator of which is the average value of the real and tangible personal property owned by, rented to, or used by the taxpayer in the District during the taxable year, and the denominator of which is the average value of the real and tangible personal property owned by, rented to, or used by the taxpayer everywhere: Provided, that neither the numerator nor the denominator of the property factor shall include property, or any portion thereof, the taxpayer's income from which is subject to direct allocation of these regulations, or which is used by the taxpayer in a trade or business, the income from which is allocable or apportionable under another method or formula of these regulations. Where property is used in any activities the income from which is allocable or apportionable partly under this subsection and partly under another section or subsection of these regulations, the taxpayer may employ, subject to the approval of the Assessor, or the Assessor may require the use of any method which will reflect properly the portion of the average value thereof to be used in arriving at the property factor under this subsection.

Property owned by the taxpayer is valued at its original cost to the taxpayer. Property rented to or used by the taxpayer is valued at eight times the net annual rental rate which is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals, provided that such rental and subrental rates are reasonable. The term "net annual rental

rate" includes amounts paid or accrued for the use or rental of the property or facilities of another whether paid as rent, reasonable compensation for use or by any other designation, and whether paid pursuant to statutory enactment, lease or rental agreement of any kind, contract, or otherwise. If the Assessor shall determine that any net annual rental rate or subrental rate is unreasonable, or if no rate is charged, he may determine and apply such rate as will reasonably reflect the average value of the property rented to or used by the taxpayer.

The average value of property shall be determined by averaging the values at the beginning and end of the tax period, but monthly or quarterly values of property may be used by the taxpayer, subject to the approval of the Assessor, or the Assessor may require the use of such values if reasonably necessary to reflect properly the average value of property owned by, rented to, or used by the taxpayer during the tax period.

(b) The payroll factor is a fraction, the numerator of which is the total compensation paid or accrued by the taxpayer in the District during the taxable year, and the denominator of which is the total compensation paid or accrued by the taxpayer everywhere during the taxable year. "Compensation" means wages, salaries, commissions, and any other form of remuneration paid or accrued to officers and employees for personal services, and, in the case of unincorporated businesses, compensation also means wages, salaries, commissions, and any other form of remuneration paid or accrued to the individual owners and members for personal services actually rendered without regard to the 20 per centum limitation provided for in Section

3(a)(15) of Title III. Compensation paid or accrued other than in cash shall be valued at its fair market value as of the date of payment or accrual, whichever is earlier. Compensation is paid or accrued in the District if—

(1) the individual's service is performed within the District, or

(2) the individual's service is performed within and without the District, but the service is performed primarily within the District, or

(3) some of the individual's service is performed in the District and (A) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the District or (B) the base of operations or the place from which the service is directed or controlled is not in the District or in any state in which some part of the service is performed, but the individual's residence is in the District.

Where compensation is paid or accrued for services the income from which is allocable or apportionable partly under this subsection and partly under another section or subsection of these regulations, the taxpayer may employ, subject to the approval of the Assessor, or the Assessor may require the employment of any method which will reflect properly the portion thereof to be used in arriving at the payroll factor under this subsection.

(c) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in the District during the taxable year, and the denominator of which is the total sales of the taxpayer everywhere during the taxable year.

Sales of tangible personal property to the United States Government are in the District if the income

derived therefrom is not excluded from gross income as provided in Title III, Section 2(b)(13) of the Act. Sales of tangible personal property, including sales to the United States Government, are in the District, regardless of the point of passage of title, f.o.b. point, or other conditions of such sales, if—

(1) the property is delivered or shipped to a purchaser within the District, or

(2) the property is delivered or shipped to a point outside the District but the ultimate destination of such property is a purchaser within the District, or

(3) the property is delivered or shipped to a purchaser outside the District but such sales result from orders taken or solicited by employees, agents or representatives of the taxpayer located in the District, or placed with or through an office or other place of business of the taxpayer in the District and such sales are not taxed to the taxpayer by the state to which the property is shipped.

March 22, 1961

[APPENDIX "C" TO OPINION]

GOVERNMENT OF THE DISTRICT OF COLUMBIA EXECUTIVE OFFICES WASHINGTON, D. C.

March 30, 1961

MEMORANDUM TO THE CORPORATION COUNSEL:

Forwarding, herewith, memorandum, under date of March 22, 1961, addressed to the Commissioners, by the

Finance Officer, entitled: "Proposed amendment to the Income and Franchise Tax Regulations implementing the District of Columbia Income and Franchise Tax Act of 1947, as amended".

Your attention is invited to the last paragraph of this memorandum, which reads as follows:

> "It is recommended that the attached proposed amendment to Section 10.2(c) of the Income and Franchise Tax Regulations be referred to the Corporation Counsel for technical legal review with instructions to incorporate this proposed amendment to Section 10.2(c) of the Regulations with the proposed amendment to Section 10.2(c) which was forwarded to the Commissioners on February 7, 1961. It is further recommended that, after review by the Corporation Counsel, a public hearing be held on the proposed amendments after which, with such changes as may appear necessary, the attached proposed amendment be approved by the Commissioners to become effective January 1, 1962".

The Commissioners, at their Board Meeting on March 28, 1961 approved this recommendation.

Secretary to the Board

/s/ GEOFFREY M. THORNETT

Attachements
/11
RF
GF
CC: Finance Officer
Mrs. Busch (Suspense)

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Caption omitted]

Decided February 21, 1963

Before WILBUR K. MILLER, FAHY and DANAHER, *Circuit Judges.*

PER CURIAM: At the petition of General Motors Corporation, the District of Columbia Tax Court reviewed and reduced the assessments of the corporation franchise taxes for 1957 and 1958 which had been made against it by the District of Columbia. Refunds were ordered in accordance with the Tax Court's assessments. The District of Columbia appeals. Its principal point is that the court erred in using a formula consisting of the elements of property, payroll and sales, instead of employing only the element of sales, as the District had done. Other points are minor.

It is our view that the opinion of the Tax Court is an adequate treatment of the problems involved. We affirm its decisions.

So ordered.

FAHY, *Circuit Judge, dissenting:* The applicable District of Columbia franchise tax, §§ 47-1571, -1571(a), D.C. Code, 1961, "for the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District," is 5 per centum upon the "taxable income" of a corporation

such as the respondent General Motors Corporation. And "taxable income" is defined generally to mean "the amount of net income derived from sources within the District." But if the trade or business is carried on both within and without the District, as in this case, the net income derived from the trade or business shall be deemed to be income from sources within and without the District. § 47-1580(a). The measure of the franchise tax shall be that portion of the net income of the corporation as is "fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District. . . ." § 47-1580.

In such cases "the portion thereof subject to tax . . . shall be determined under regulation or regulations prescribed by the Commissioners." § 47-1580(a). This section also provides that the Assessor is authorized to employ any formula provided in any such regulation which, in his opinion, should be applied to determine the net income of any corporation subject to the tax. The formula thus employed and here under attack is set out in the margin.[1]

Regulations promulgated under the authority of enactments of the Congress have the force and effect of law, amounting in such a case as this to "filling up the details" of a statute. *Wayman* v. *Southard*, 23 U.S. (10 Wheat.)

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[1] "Where income for any taxable year is derived by the taxpayer from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. . . ." Sec. 10.2(c) as amended by Commissioners' Order No. 61-1214 of July 14, 1961.

This section then goes on to define District sales. We accept the Tax Court's delimitation of the case to the apportionment question, leaving aside any question as to the appropriateness of the definition of District sales.

1, 43 (1825). A court should be very slow to set aside such regulations.[2] Under the statute above referred to the District has established a formula by which net income attributable to District sources can be determined. Apportionment for purposes of ascertaining District income under this formula is based upon sales made in the District. No attempt is made to levy the franchise tax on any sales made elsewhere by General Motors. Thus the case is free of one of the difficulties involved in *District of Columbia* v. *Evening Star Newspaper Co.*, 106 U.S. App. D.C. 360, 273 F.2d 95 (1959).

The Tax Court of the District of Columbia is evidently of the view that what the statute means—though the statute does not so state—is that income from District sources must be deemed to be from internal and external sources (as opposed merely to deeming the taxpayer's total income to be both from within and without the District) when the trade or business is carried on externally as well as internally. It implies that this reading is especially called for when, as in this case, the taxpayer's principal offices and plants are located in other places. We are not unaware that the growing demand of states and cities for revenue has created a difficult problem where an interstate business is concerned. But in the present state of the law the District is authorized by Congress to assess a franchise tax on the basis of an apportionment which reaches income attributable to the District. The regulations of the Commissioners are designed to permit no less, and no more.[3]

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[2] See the dissenting opinion of Mr. Justice Black in *Brannan* v. *Stark*, 342 U.S. 451 (1952), where it is said: "[W]hen administrators have interpreted broad statutory terms . . ., we would recognize that it is our duty to accept this interpretation even though it was not 'the only reasonable one' or the one 'we would have reached had the question arisen in the first instance in judicial proceedings.'" 342 U.S. at 484.

[3] The case of *Hans Rees' Sons* v. *North Carolina*, 283 U.S. 123 (1930), is clearly distinguishable. While a single factor

It is urged that as a matter of economics income is produceable not alone out of sales but also by combining the elements of capital and labor. I do not disagree. And it may be assumed from an overall view of efficient taxation among the various taxing jurisdictions that a formula which takes into account these additional factors may be a more appealing one. But we have before us regulations drafted and applied by the officials authorized to do so, and I cannot say they are unreasonable under the authorizing statute. The assessments accordingly should not have been reduced by the Tax Court; that is to say, the Tax Court should not have superimposed a formula of its own.

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apportionment formula was there used it was so applied as "to reach profits which are in no just sense attributable to transactions within [the state]." The Court felt warranted in so concluding, because, though the taxpayer's plant was located in the taxing state, its sales were principally in other states and the state was determined to take a percentage of net income based on the relative size of assets within the state to holdings elsewhere. The Court did not condemn single factor formulae per se. *Cf. Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113 (1920), upholding a statute using a single factor formula.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Caption omitted]

On Rehearing en banc

Decided February 13, 1964

Before: BAZELON, Chief Judge, WILBUR K. MILLER, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, WRIGHT and MCGOWAN, Circuit Judges sitting *en banc*.

MCGOWAN, *Circuit Judge*, with whom *Chief Judge* BAZELON and Circuit Judges FAHY, WASHINGTON and WRIGHT join: These petitions for review from the District of Columbia Tax Court involve the propriety of assessments under the District's Income and Franchise Tax Act against General Motors Corporation for the years 1957 and 1958. The tax is levied on the net income of General Motors for the privilege of carrying on business within the District; and, as such, is similar to taxes levied by many of the States. The question before this court concerns the legally permissible formula for determining that portion of the net income of a unitary multi-state business which is properly taxable by the District of Columbia. The Tax Court ruled that the District's single-factor formula of apportionment was not permitted by the statute; and, on its own initiative, substituted a three-factor formula. A division of this court, one judge dissenting, affirmed the Tax Court. Because of the importance of the problem to the administration of local taxes, we granted

the District's petition for rehearing *en banc*. We now decide that the decisions of the Tax Court must be reversed.

I

The District of Columbia Code imposes a "franchise tax upon every corporation . . . for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District," to be measured by "that portion of the net income of the corporation . . . as is fairly attributable" to that business.[1] Where the business "is carried on or engaged in both within and without the District, the net income derived therefrom shall . . . be deemed to be income from sources within and without the District," and the portion subject to tax shall

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[1] D.C. Code § 47-1580:

"It is the purpose of this subchapter to impose (1) an income tax upon the entire net income of every resident and every resident estate and trust, and (2) a franchise tax upon every corporation and unincorporated business for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District: *Provided, however*, That, in the case of any corporation, the amount received as dividends from a corporation which is subject to taxation under this subchapter, and, in the case of a corporation not engaged in carrying on any trade or business within the District, interest received by it from a corporation which is subject to taxation under this subchapter shall not be considered as income from sources within the District for the purposes of this subchapter. The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District; *Provided further*, That income derived from the sale of tangible personal property by a corporation or unincorporated business not carrying on or engaging in trade or business within the District as defined in sections 47-1551 to 47-1551c shall not be considered as income from sources within the District for purposes of this subchapter, with the exception of income from sale to the United States not excluded from gross income as provided in section 47-1557a (b) (13)."

be determined by regulations prescribed by the District Commissioners.[2]

Under regulations promulgated August 6, 1953, the formula for determining the tax of a sales corporation engaged in business "partly within and partly without the District" is based on a sales factor. The portion taxed by the District is the percentage of the corporation's total net income (determined under other sections of the District Code not here in direct controversy) that its "District sales made during such taxable year bear to the total sales made everywhere during such taxable year."[3]

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[2] D.C. Code § 47-1580a:

"The entire net income of any corporation or unincorporated business, derived from any trade or business carried on or engaged in wholly within the District shall, for the purposes of this subchapter, be deemed to be from sources within the District, and shall, along with other income from sources within the District, be allocated to the District. If the trade or business of any corporation or unincorporated business is carried on or engaged in both within and without the District, the net income derived therefrom shall, for the purposes of this subchapter, be deemed to be income from sources within and without the District. Where the net income of a corporation or unincorporated business is derived from sources both within and without the District, the portion thereof subject to tax under this subchapter shall be determined under regulation or regulations prescribed by the Commissioners. The Assessor is authorized to employ any formula or formulas provided in any regulation or regulations prescribed by the Commissioners under this subchapter which, in his opinion, should be applied in order to properly determine the net income of any corporation or unincorporated business subject to tax under this subchapter."

The rate of tax is 5% (D.C. Code § 47-1571a) of the corporation's "taxable income," which is defined in D.C.Code § 1571 as "the amount of net income derived from sources within the District within the meaning of sections 47-1580 to 47-1580b."

[3] "Section 10.2-(b): 'Allocated' and 'Apportioned' Defined. The word 'allocated' as hereinafter used in reference to income and deductions therefrom means a determination based upon actual figures specifically applicable thereto; and the word 'apportioned' as hereinafter used in reference to net income means a ratable portion determined on a percentage basis. If the entire net income is de-

rived from engaging in a trade or business within the District or from sources within the District, all of such income shall be allocated to the District. If the net income is derived from engaging in a trade or business partly within and partly without the District, or from sources both within and without the District, such income shall be allocated and apportioned in accordance with the specific provisions or formulae prescribed in these Regulations."

"Section 10.2-(c): Income Attributed to the District of Columbia. If the trade or business is carried on or engaged in wholly within the District, the entire net income from trade or business shall be allocated to the District. If the trade or business is carried on partly within and partly without the District, that portion of the net income from trade or business to be apportioned to the District shall be determined as follows:

(1) Income from sales of tangible personal property.

(a) Where income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. Every corporation and unincorporated business which carries on or engages in business in the District within the meaning of the words 'trade or business' as defined in the Act is, unless specifically exempted by some provisions of the Act, subject to tax. For the purpose of this regulation, the phrase 'District sales' shall mean all sales to District customers the income from which is fairly attributable to the trade or business carried on or engaged in within the District, including solicitation in the District by salesmen or other representatives of the taxpayer, that portion of sales to customers outside the District the income from which is fairly attributable to the trade or business carried on in the District, and sales of tangible personal property the income from which is from District sources."

These sections are as numbered in the Regulations of July 24, 1956, which reenacted without change the provisions relevant to this case.

On July 14, 1961, the District promulgated new regulations, in response to this court's decision in *District of Columbia* v. *Gallant Inc.*, 110 U.S.App.D.C. 202, 290 F.2d 745 (1961). The controversy in *Gallant* concerned the definition of "District sales," which was found deficient in the earlier regulations, rather than the propriety of the apportionment formula. As will be seen, only the latter point is at issue here. The apportionment formula remained the same as in the 1953 regulations. In *Gallant*, after a remand to the Tax Court and after the new regulations were promlulgated, the case again came before this court. 113 U.S.App.D.C. 92, 305 F.2d 761 (1962). We held that the 1961 regulations could not be applied

For the taxable years 1957 and 1958, General Motors paid a small tax on the theory that only that portion of its income which was derived from business conducted through a District office of one of its divisions constituted "District sales" which were "fairly attributable" to business done within the District. General Motors contended that other sales to dealers in the District did not constitute "trade or business" within the District. The District refused to accept the returns for either year, and in 1959 mailed notices of tax deficiencies. The District's theory was that income derived from sales of automobiles, other vehicles, and parts to dealers in the District was income from a "trade or business" carried on "partly within and partly without the District," and hence subject to apportionment for the purpose of determining the tax owed to the District. General Motors duly protested the notices of proposed deficiencies. After a hearing, the District Finance Officer rejected the protests and on February 4, 1960, a formal assessment of taxes due was mailed to the company.

General Motors paid the assessment under protest, and appealed to the Tax Court. In that court, two primary arguments were urged as to the invalidity of the assessed deficiencies: one, that the numerator of the sales formula was too broad, in that it included sales which were not "District sales"; and, two, that use of the single-factor apportionment formula itself was permitted neither by the District Code nor by the Constitution. General Motors requested that all of the additionally assessed tax be refunded.

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retroactively to determine the tax liability for 1956, but we expressed "no opinion as to whether the 1961 amendments are valid or whether they may in other cases or circumstances be applied retroactively." Since in this case the issue involved is the same under both the new and old regulations, we have no occasion to reconsider our holding in *Gallant*.

The Tax Court reversed the assessment, but not to the extent prayed for by General Motors. That court held the single-factor sales formula unauthorized by the District Code, and, in its place, substituted a three-factor formula of property, payroll and sales, each factor receiving equal weight.[4] The result was a tax substantially less than the District's assessment, but also substantially in excess of the amount originally paid by the taxpayer.

Only the District has appealed from the decisions of the Tax Court. General Motors has not, by an appeal of its own, pressed its original request to have the entire additional assessment refunded. For purposes of this appeal, it appears to concede the correctness of the figures found by the Tax Court as representing "District sales." The controversy before us, therefore, does not relate to the definition of what sales by General Motors properly may be taken to be "District sales," made in the course of a

[4] Numerous qualified economists testified for General Motors in the Tax Court. The general consensus of their testimony, relating to a unitary business such as the manufacturer and sale of personal property, was that the income realized from the sale of the finished product is earned by the business as whole, *i.e.*, by the combination of labor and capital beginning with the first stage in the manufacturing process, and ending with final sale. They contend the single-factor sales formula utilized by the District actually allocates to the jurisdiction where the final sale occurs all of the income which is earned at all stages. The Tax Court agreed. Because all of the products sold in the District were manufactured in other states, it "found" that the income from a sale made in District was actually earned "partly within and partly without" the District, and that the sales formula did not apportion that income as required by the District Code. The court held that the proper formula was one utilizing a combined ratio of General Motors' property in the District to total property, District payroll to total payroll, and District sales to total sales. The sales figures involved and not now in controversy are as follows:

	1957	*1958*
Total sales	$9,461,855,874.00	$7,853,393,381.00
District sales	37,185,704.00	32,542,519.00
Net Income (to be apportioned)	1,312,092,839.15	653,396,893.13

business activity which is carried on both within and without the District. It relates, rather, to the formula to be used for apportioning to the District that part of General Motors entire net income attributable to its "District sales." The District, of course, contends that the single-factor formula is valid. In addition, the District presents an alternative argument which was not made in the Tax Court, namely, that sales to dealers is "other income . . . derived from sources within the District." General Motors argues, first, that the District Code does not permit a formula based only on the sales factor; and, second, that such a formula, if authorized by the statute and as applied to it, is barred by the due process and commerce clauses of the Constitution. The Tax Court did not reach the constitutional issues.

II

Although not critical to a determination of this appeal in its present posture, some analysis of General Motors' operations in the District enlarges understanding of the issue we do face. The company's principal business is the manufacture and sale of automobiles, trucks and other vehicles, and parts and accessories. No manufacturing or assembly is conducted within the District, but takes place primarily in Michigan, Delaware, and Maryland as to products sold in the District. Orders from dealers are received and filled, and title passes, outside the District.

In addition to a central management staff located primarily in Detroit, Michigan, General Motors is organized into divisions, which operate substantially independently of each other. Of the five Car Divisions, four (Pontiac, Buick, Oldsmobile, and Chevrolet) have substantially identical operations throughout the country. Within the District in 1957 and 1958, Pontiac and Buick had four dealers each, Oldsmobile and Chevrolet five each. Subject to certain exceptions immaterial here, these divisions sold their products only to authorized dealers.

Each dealer operated under a "Dealer Selling Agreement" which contained a detailed recitation of the parties' obligations. Besides dealing with price (to the dealer, who was not obligated to resell the product at a particular price) and delivery terms, the agreement required the dealer to maintain a satisfactory place of business. Once the dealer was established in facilities and at a location mutually satisfactory to himself and the division, he agreed not to move to or establish a new or different location, branch sales office, branch service station, or place of business, including any used car lot or location, without the prior written approval of the division. Each dealer agreed to maintain specified standards for capital and net worth. He was required to use a uniform accounting system and submit 90-day sales projections, monthly financial and operating statements, and 10-day reports of sales and inventories; and to permit the company to examine his accounts and records when requested. Each agreement required satisfactory sales performance and service to purchasers, and an adequate staff and inventory of parts and accessories. The dealer was also required to erect certain specified signs necessary to advertise the company's products on a mutually satisfactory basis. Finally, the company could terminate the agreement for failure of the dealer to comply with its terms, and a dealer could terminate with or without cause by giving thirty days' notice.

The company's Motors Holding Division, with an office in the District, provided temporary financial assistance for the establishment, reorganization, or expansion of dealerships. In 1957 and 1958, four of the eighteen dealers in the District were receiving this financial aid. Under the program, the dealer provided at least twenty-five per cent of the required capital, and Motors Holding provided the remainder, in return for voting control. The dealer was required to buy Motors Holdings' interest

under a formula geared to operating results. During the program, he was required to submit financial reports every ten days, and an accounting supervisor and branch manager made periodic inspection visits.

Additional inventory financing was available to established dealers through General Motors Acceptance Corporation, a wholly-owned subsidiary which had an office in the District. When a dealer utilized this financing, security title passed to GMAC at the factory. During 1957 and 1958, the four District Pontiac dealers were financed by GMAC.[5]

For administrative purposes, each of the divisions had subdivided the country into "regions." Each region was further subdivided into "zones." As stipulated by the parties, the activities of the Pontiac Division organization are typical. The regional office which served the District was located in New York City. A zone office located in Chevy Chase, Maryland, part of the Washington Metropolitan Area, served the District, most of Virginia and Maryland, and small parts of Pennsylvania and West Virginia.[6] There were 120 Pontiac dealers in the zone in the taxable years here involved. The zone manager and his assistant made periodic visits (approximately once a month) to each dealer in the zone, for the purpose of advising on market opportunities, furthering the sale of promotional literature, and maintaining dealer interest in company items to aid the sale of Pontiac automobiles.

These goals were also furthered by one of four district managers who spent all of his time visiting dealers in the Washington Metropolitan Area (28 dealerships). Once a month each dealer submitted to the district man-

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[5] There is no indication in the record of the financing arrangements of the other dealers.

[6] The Oldsmobile and Buick zone offices serving the District were in Silver Spring, Maryland, also a part of the Washington Metropolitan Area.

ager a 90-day projection of new car requirements. Actual orders for new cars were usually sent directly to the zone office, although the district manager personally took orders to that office on occasion. The orders were processed at the zone office and forwarded for final approval to an assembly plant, where they were filled for shipment, f.o.b. factory, by common carrier directly to the dealer. The zone office also maintained a warehouse outside the District where a small inventory of new cars was kept, and sold from 50-100 cars a month therefrom. When purchased in this manner, the dealer himself would pick up the car from the warehouse.

Other zone office personnel who spent all or a portion of their time visiting and working with the dealers included an assistant zone manager (fifty per cent of his time); a business management manager (seventy-five per cent); a parts and service manager (seventy-five per cent); a claims administrator and his assistant (ninety per cent and one hundred per cent, respectively); and three service representatives (one hundred per cent). In addition to zone office personnel, national and regional Pontiac representatives made periodic visits to the zone.

With one exception, none of these Car Divisions maintained offices in the District. Chevrolet had a regional office in the District which supervised five zones. No dealer orders passed through the District office, but instead were sent directly to the Baltimore zone office, which also served the District. Personnel from Baltimore operated in the District in essentially the same manner as Pontiac's zone personnel. The Baltimore zone was responsible for processing owners' complaints regarding service by District dealers. It also initially passed upon applications for new dealerships, scrutinizing the business history and credit of an applicant. The regional office in the District then received the application and forwarded it with a recommendation to the Detroit office for final

approval. A fleet manager worked out of Chevrolet's regional office in the District. His function was to be in touch with local and national fleet users and promote fleet orders. Approximately forty per cent of his time was spent in Washington.

The Cadillac Division had a less elaborate organization than the other Car Divisions, but it still maintained similar organizational control. Cadillac operated through independently-owned distributorships, which in turn appointed dealers. Each distributor, who was also a dealer, performed functions similar to the zone offices of the other divisions. In 1957 and 1958, there was one distributor in the District, who also had the only Cadillac dealership in the District. Two other dealers in the surrounding area were appointed by him. The distributor was the primary contact with Cadillac's central offices, analogous to the zone offices of the other divisions. Dealers' reports, similar to those submitted by dealers in the other divisions, were channeled through the distributor to the Detroit office. A district manager employed by Cadillac supervised and coordinated the efforts of the seven distributors (forty-nine dealers) in the District and nearby states. He maintained a residence in the District and usually prepared his reports here. His primary function was to help the distributors, and through them the dealers, perform more efficiently.

Besides the Car Divisions, General Motors had several other operating divisions. GMC Truck & Coach Division operated under an organizational system similar to that of the four Car Divisions. It promoted the sale of vehicles and parts and supervised the activities of its dealers, who operated under Dealer Selling Agreements. There was one GMC Truck dealer in the District. A division representative and a service representative personally approached bus company customers in the District to promote coach sales and advise on service problems.

The Government Sales Section, the Cleveland Diesel Engine Division, the Detroit Diesel Engine Division, and the Allison Division also had offices in the District for the purpose of selling their products to the United States Government and to maintain general liaison with the Government.[7] None of the car or truck divisions made Government sales.

The United Motors Service Division, responsible for wholesale distribution of certain parts and accessories for General Motors products, maintained a zone office in the District. Orders taken in the District were filled from plants outside the District. The division maintained written agreements with wholesalers, seventeen of which were in the District.[8]

The AC Spark Plug Division maintained offices in the District only for liaison with the federal government. Nongovernment sales were made by personnel headquartered outside the District. Sales in the District, made to wholesalers and national accounts, were made by a territory manager, whose duty was to promote sales through sales meetings with the seven warehouse distributors in the District, sales contests, and display and merchandising programs.

Several administrative offices were maintained in the District. GMAC and Motors Holding Division have been previously discussed. The Business Research Staff had

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[7] So far as the record indicates, income from operations of these divisions is not involved in this case. D.C.Code § 47-1557a (b)(13) excludes from the definition of "net income"

> "Income derived from the sale of tangible personal property to the United States by corporations . . . having their principal places of business located outside the District, which property is delivered from places outside the District for use outside the District . . . ."

[8] It was the income derived from the operations of this division which General Motors originally contended was the only income taxable by the District.

the function of forecasting general economic conditions and their effect on the sale of company products. The General Motors Overseas Operations Division dealt with the United States and foreign governments and international agencies in respect of products sold abroad. The Patent Section conducted patent research and did some detail work regarding litigation. Its central Detroit office handled licensing and other business matters related to patents. The Public Relations Staff handled any necessary lobbying, relations with the press and other communications media, and general services to visiting executives.

On the basis of past decisions of this court,[9] it is clear that General Motors is engaged in "trade or business" within the District, as that term is defined in the District Code.[10] The company does far more than promote the sale of its products in the District for the benefit of what it calls "independent contractors." The provisions of the Dealer Selling Agreements constitute a continuing business relationship with its "authorized dealers," in which General Motors exercises a large degree of control over daily business operations. Additional control was exercised through the financial aid given by Motors Holding Division and GMAC. "[General Motors had] supervisory control over at least a substantial part of the business of the local [dealer] or representative or at least a part-time claim on the services of the individuals or organizations acting for it."[11]

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[9] *Lever Bros. Co.* v. *District of Columbia*, 92 U.S.App.D.C. 147, 204 F.2d 39 (1953); *cf. Fiat Motor Co.* v. *Alabama Imported Cars, Inc.*, 110 U.S.App.D.C. 252, 292 F.2d 745, *cert. denied*, 368 U.S. 898 (1961).

[10] D.C.Code § 47-1551c (h).

[11] *Lever Bros. Co.* v. *District of Columbia*, 92 U.S.App.D.C. at 149, 204 F.2d at 41.

For the same reasons that General Motors' operations subject it to taxation in the District, the provisions of Public Law 86-272, § 101,[12] do not remove it from the taxable jurisdiction of the District. That law, enacted in 1959, protects a business from taxation by a State if the only business activities within the State involve solicitation of orders for the business itself, or for its prospective customers. The law's proscription applies only in the case of these minimal business contacts. We think the facts already outlined are sufficient to show that the activities of General Motors surpass any mere solicitation of business.[13]

General Motors recognizes that neither the District Code nor P.L. 86-272 removes it from all taxation by the District. In its brief, it states that "[I]t will be noted that these protective statutes, construed and applied as we urge, although they forbid the assessments made in this case, do not exempt [the company] from paying to the District a franchise tax based on net income." The controversy we face, therefore, is not one as to the District's jurisdiction to tax General Motors at all, nor as to the number of dollars arising from the so-called District sales. Our problem is as to the propriety of the formula used to identify, in General Motors total net income, that portion which may be reasonably thought to flow from the District activities and sales.

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[12] 73 Stat. 555, 15 U.S.C. §§ 381-84. The law was passed in response to the Supreme Court's decision in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959). See Hirshberg & Nedry, *A Federal Concept of Doing Business*, 46 VA. L. REV. 1241 (1960); Roland, *Public Law 86-272: Regulation or Raid*, 46 VA. L. REV. 1172 (1960). For present purposes, we assume that the law applies to the District and to the taxable years involved.

[13] The act also protects a business which sells only through "independent contractors," which are defined as persons selling or soliciting sales "for more than one principal." General Motors' dealers are not in that category.

III

The first issue we confront is whether the District Code permits use of the single-factor sales formula. The question is not a new one in this court, although this is the first time the whole court has had occasion to consider it.[14]

The statute, set forth above,[15] clearly does not require use of any particular formula. Nor can we discover a Congressional purpose or intent that a particular formula be utilized. The statute expressly delegates to the Commissioners the power to adopt any formula that will effectuate the taxing scheme devised by Congress. Thus, however much we might applaud a specific formula as a matter of wise fiscal and economic policy, we are not at liberty to substitute it for that adopted by the Commissioners. The most that we could do is to reject the Commissioners' approach as unauthorized.

The statute, in §§ 47-1580 and 47-1580a, contemplates three mutually exclusive sources of corporate net income taxable by the District. The first source, "allocated" to

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[14] The formula was specifically upheld as valid under the statute in *Smoot Sand & Gravel Corp. v. District of Columbia*, 104 U.S. App.D.C. 292, 261 F.2d 758, *cert. denied*, 359 U.S. 968 (1958), over the taxpayer's objection that its net income should have been "apportioned by a formula which takes into account its property values and operating costs, as well as sales; [and] that the regulation is invalid because it directs the apportionment of net income by considering only sales . . . ." In *Smoot*, we were in agreement with the Tax Court. However, three years later, in the first *Gallant* case, *supra*, the Tax Court ruled the single-factor formula invalid as not authorized by the statute. We reversed the Tax Court on that point, citing *Smoot*. In the instant case, the Tax Court again held the single-factor formula invalid, noting that in *Smoot* "[T]he U. S. Court of Appeals evidently overlooked the mandate of the statute as to apportioning the income within and without the District. . . ." It is evident, however, from the reported decision in *Smoot* that the panel deciding that case, with full awareness of this and other provisions of the statute, held that the District Code does not preclude the use of a single-factor sales formula.

[15] See footnotes 1 and 2, *supra*.

the District, is the income from a trade or business which is "carried on or engaged in wholly within the District." In such a situation, the gross income and expenses arise in the District, and the District is entitled to tax the entire net income from the business. The second source, also "allocated" to the District, is "other income . . . derived from sources within the District." Again the gross income and expenses arise in the District, and the District may tax the entire net income.[16] The third source, and the one in controversy here, is income from a trade or business conducted both within and without the District. The income from this source must be "apportioned," and only that portion attributable to the trade or business conducted in the District is taxable. The Commissioners' formula for making the required apportionment is as follows: Net income arising from activities within the District (and thus taxable) is to total net income of the corporation as sales made within the District is to total sales made by the corporation.[17]

It is this formula for apportionment that General Motors challenges and the Tax Court held unauthorized un-

[16] The District argues here that, regardless of whether General Motors' income from District sales is taxable under the provision applicable to corporations conducting a trade or business in the district, it is taxable as "other income . . . derived from sources within the District." Since the Tax Court held that the income from District sales was taxable under the "trade or business" provision and General Motors did not apeal that finding, and since we find the income to be fully taxable under the "trade or business" provision, we need not at this time pass on the scope of the "other income" provision. However, it should be noted that this court has interpreted that provision to cover income arising from transactions outside the scope of a regular "trade or business" carried on within the District, such as rents, royalties, and income from the sale of real property. *District of Columbia* v. *Evening Star Newspaper Co.*, 106 U.S.App.D.C. 360, 273 F.2d 95 (1959); see *Lever Bros. Co.* v. *District of Columbia*, *supra*. The interpretation called for by the District would result in an overlap of the two provisions not called for by the taxing scheme.

[17] Regulations Pertaining to Income & Franchise Taxes, promulgated on August 6, 1953, § 10.2 (c)(1)(a), set forth in footnote 3 *supra*.

der the statute. It is contended that the sales formula adopted is in conflict with the taxing scheme and allots to the District a greater portion of the income of unitary interstate businesses than was intended. This contention is based upon a theoretically possible reading of certain key words of the statute. That reading is at least implicitly in conflict with prior interpretations by this court.[18]

The crucial language is: "If the trade or business of any corporation . . . is carried on or engaged in both within and without the District, *the net income derived therefrom shall* . . . be deemed to be income from sources within and without the District." [Emphasis added.] D.C. Code § 47-1580a. General Motors and the Tax Court would interpret the words italicized to refer to net income *arising from activities in the District.* In this case, those activities principally involve sales. They then argue that the net income so earned must be "deemed to be income from sources within and without the District." Thus, the apportionment called for must be an apportionment of only this income. A permissible formula, under this interpretation, would first require a determination of the net income on the sales made in the District. Apparently the sales-income ratio would be appropriate for this purpose. But this is only the first step. The net income so determined would then be "apportioned" under a formula which would assign a part of the net income to each step in the manufacture-distribution process. This would recognize the fact that each step "earns" part of that income. The District would only be permitted to tax that part of the net income "earned" by the steps in the process which occur in the District, in this case prin-

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[18] See cases cited in footnote 14, *supra*. See also *Eastman Kodak Co.* v. *District of Columbia*, 76 U.S.App.D.C. 339, 131 F.2d 347 (1942) (considering the same question under the gross receipts tax in effect before 1947).

cipally the final sales step.[19] The District would not be permitted to tax that income economically attributable to the processing stages before sale, since they occur outside the District. This would call for some cost accounting formula that would divine the exact amount of income generated by each element of the manufacturing and distributing process through which a particular product passes on its way from raw materials to ultimate sale. They argue that the three-factor formula, while not a precise cost accounting method of separating and applying the net income from a sale to the various stages, is a rough equivalent and is therefore authorized by the statute, but that the single-factor sales formula is not authorized since it does not even attempt such an application.[20]

The District, on the other hand, argues, and we think correctly, that the net income to be apportioned is the net income from the entire business of the corporation rather than that income arising solely from District sales. To read the statute as General Motors requests, the word "therefrom" must refer only to net income arising from that part of a trade or business carried on *within* the District. But it seems clear to us, from a simple reading of the words used, that "therefrom" refers to the income

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[19] They concede that the income "earned" on activities in the District other than sales would also be taxable under this scheme.

[20] Whether anything short of a precise cost accounting system, which would fairly apply the net income to the various processes, would satisfy General Motors' reading of the statute is a serious but moot question. It is not at all clear that the three-factor formula is even a close approximation of the kind of economic breakdown called for. While there is some relationship between the cost of payroll and property attributable to a certain stage and the income arising from that stage, it is not at all certain what that relationship is. Moreover, the sales process, being the end product of all the other stages and responsible for the actual receipt of the *money* income, could be said to be the most important stage, thus permitting a greater proportionate share of the income to be assiged to it vis-a-vis the other steps in the process.

earned internally *and* externally by a corporation that carries on a trade or business both within and without the District, that is to say, its total income. Only by putting in language which does not appear can "net income" be restricted to that arising only from District sales. Read as we read it, the statute clearly permits, although it does not require, the single-factor sales formula adopted by the Commissioners.

The General Motors interpretation is obviously a complex and sophisticated one. We believe it more probable that the District's approach reflects the intent of Congress. A court should not apply a taxing statute more narrowly than its clear language imports unless there is some showing of Congressional intent that it should do so. The revenue act of which the franchise tax is a part was passed in 1947 to raise desperately needed revenues for the District. It was subjected to extensive study by a joint committee of Congress;[21] it was debated at length in the House and to a lesser extent in the Senate;[22] and several reports were written concerning it.[23] Nowhere in this material is there any indication that the crucial language in this section was intended to be read as General Motors suggests. This seems particularly important since, as we pointed out in the *Smoot* case, the prior gross receipts tax has been interpreted by this court to permit a single-factor sales formula similar to that presently used

[21] See *Hearings Before the Joint Subcommittee on Fiscal Affairs of the Committee on the District of Columbia on Methods of Acquiring Additional Revenue Through Taxes and Other Means*, 80th Cong., 1st Sess. (1947).

[22] See, *e.g.*, 95 Cong. Rec. 6629 (1947) (House); 95 Cong. Rec. 7357 (1947) (Senate).

[23] House Comm. on the District of Columbia, *Tax Legislation for the District of Columbia, Re: H.R. 3737*, Committee Print, 80th Cong., 1st Sess. (1947); S. Rep. No. 280, 80th Cong., 1st Sess. (1947); H.R. Rep. No. 543, 80th Cong., 1st Sess. (1947); H.R. Rep. No. 699, 80th Cong., 1st Sess. (1947); H.R. Rep. No. 801, 80th Cong., 1st Sess. (1947).

by the District.[24] It would seem that any intended change in application would have been indicated clearly by Congress.

Thus, we must find that the apportionment required relates to the entire net income of the corporation. We hold that the single-factor sales formula is permitted by the statute and, unless it is unconstitutional, the Tax Court must be reversed.

As noted above, the Tax Court invalidated the single-factor formula in this instance solely by reference to the statute and not to the Constitution. It expressly disclaimed the latter as a ground of decision because of the uncertainties it entertained as to its own status, i.e., court or administrative agency. We see no need to pursue this problem at this time, but we do think it appropriate to note that the record in this case was made up of evidence taken by the Tax Court, and its findings of fact are to be treated with the respect customarily accorded to the trier by a reviewing body.

One of those findings might well be thought to be conclusive upon us, absent any demonstration by us of a lack of foundation for it in the record. This is the last of the findings, No. 6, which is as follows:

> "The method used by the assessing authority of the District attributed to the District 100 per centum

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[24] See *Panitz* v. *District of Columbia*, 74 U.S.App.D.C. 284, 122 F.2d 61 (1941); *Eastman Kodak Co.* v. *District of Columbia*, *supra*. Moreover, the regulations promulgated in 1947, immediately after the Act was passed, included the same sales formula now in use. Regulations Pertaining to Income and Franchise Taxes, promulgated August 28, 1947, § 10-2 (d) (1). The Commissioners participated actively in the drafting of the Act and it would seem that they would have been aware of any intended change. This is not to say that, since they participated in the drafting, anything they do reflects the intent of Congress. However, if a change was intended, it would seem that the District officials would have at some point in the legislative process spoken out on the matter.

of the net income derived by the petitioner from that segment of its business which consisted of the manufacture without, and sale [illegible]he products within the District. The percentage [illegible]us determined was out of all reasonable proportion to the trade or business carried on or engaged in by petitioner within the District."

It seems evident that the first sentence of this finding is the premise for the second, which latter, standing alone and undisturbed, would take the taxpayer here beyond the reach of the taxing statute. The premise in this instance, although stated in factual terms, appears to us to reflect the faulty reading of the statute which we have discussed at length immediately hereinabove. In other words, the premise assumes that the net income to be apportioned is only that derived from transactions which touch upon the District of Columbia, as distinct from the total net income of General Motors from its operations at large, including those physically related to the District of Columbia.

To the extent, therefore, that No. 6 is a true finding of fact, it rests upon an erroneous view of the applicable law; and, therefore, we do no violence to sound principles of appellate review when we conclude that this finding does not dictate our decision. We need not demonstrate that the particular fact found is untrue if it is irrelevant.

IV

Our inquiry, however, is not finished with the determination that the District Code permits the tax formula in use. We turn to the claim that the single-factor sales formula violates the due process clause by unreasonably apportioning income which properly has no relation to business done in the District, and the commerce clause by imposing an excessive burden of taxation.

That a single-factor formula is not inherently arbitrary or unreasonable is too well-settled to be subject to doubt at this late date.[25] Nor is this controverted by the holdings in other cases that multi-factor formulas are also constitutional.[26] The question remains, however, whether as to this taxpayer the tax is arbitrary and unreasonable. The burden of showing this is on the taxpayer; and the burden is a heavy one. "One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed." *Butler Bros* v. *McColgan*, 315 U.S. at 307. General Motors concedes that it was subject to taxation by the District. The company has not sustained its burden of showing that the tax levied on it, as determined by the single-factor sales formula, was "not reasonably attributable"[27] to the business transacted in the District so as to result in the taxation of extraterritorial values.

The evidence offered by General Motors in the Tax Court showed that only a small percentage of its property and payroll was located in the District. On the basis of testimony given by the economist-witnesses that, from an economic standpoint, income must be spread across the entire manufacturing process which precedes the ultimate sale in order to reflect the points where that income was actually "earned," the Tax Court found that a three-factor

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[25] *Smoot Sand & Gravel Corp.* v. *District of Columbia, supra; Eastman Kodak Co.* v. *District of Columbia, supra; Panitz* v. *District of Columbia, supra; Ford Motor Co.* v. *Beauchamp*, 308 U.S. 331 (1939); *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U.S. 271 (1924); *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113 (1920).

[26] *Northwestern States Portland Cement Co.* v. *Minnesota, supra; International Harvester Co.* v. *Evatt*, 329 U.S. 416 (1947); *Butler Bros.* v. *McColgan*, 315 U.S. 501 (1942); *United States Glue Co.* v. *Town of Oak Creek*, 247 U.S. 321 (1918).

[27] *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U.S. 123, 133 (1931).

formula must be utilized to reflect accurately the income taxable in the District. With this finding, General Motors now contends that it has met the burden of showing the tax "not reasonably attributable" to its business conducted in the District. We disagree. An analysis of Supreme Court decisions illustrates that proof that a tax is not in reasonable proportion to business conducted must be much more detailed and specific than that adduced here.

In *Underwood Typewriter Co.* v. *Chamberlain, supra,* the Supreme Court held that the taxpayers had not sustained their burdens of showing that the taxes involved were arbitrary and unreasonable. The State of Connecticut imposed a tax on net income based on a single-factor property formula, which resulted in a tax on forty-seven per cent of Underwood's income. Underwood relied upon a showing that most of its receipts were from sales made outside the State:

> "But this showing wholly fails to sustain the objection. The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other States. In this it was typical of a large part of the manufacturing business conducted in the State. The legislature in attempting to put upon this business its fair share of the burden of taxation was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the State." [28]

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[28] 254 U.S. at 120-21. The burden which *Underwood* failed to carry was " 'showing that 47 per cent of its net income [was] not reasonably attributable, for purposes of taxation, to the manufacture of products from the sale of which 80 per cent of its gross earnings was derived after paying manufacturing costs.' " *Ibid.*

The taxpayer in *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n., supra,* engaged in brewing (done wholly in England) and

It should be noted that in this quotation the Supreme Court accepted the economic theory here advanced by General Motors, namely, that "[T]he profits were largely earned by a series of transactions beginning with manufacture . . . and ending with sales. . . ." The theory proved the case in *Underwood* no better than it does here.

The case most strongly relied on by General Motors in its constitutional argument does not closely resemble the one before us. In *Hans Rees' Sons, Inc. v. North Carolina, supra*, the Supreme Court held that a North Carolina income tax based upon a single-factor property formula was arbitrary and unreasonable as applied to the taxpayer, who was engaged in the manufacture and sale of leather goods. In this case the Supreme Court was confronted with this characterization of the evidence by the North Carolina Supreme Court:

> "Without burdening this opinion with detailed compilations set out in the record, the evidence offered by the petitioner tends to show that for the years 1923, 1924, 1925, and 1926, the average income having its source in the manufacturing and tanning operations within the State of North Carolina was seventeen per cent." (quoted at p. 127 of 283 U.S.).

At the same time, the evidence showed that, for the same year, the percentage of the taxpayer's total net income apportioned to North Carolina by the formula in question

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selling ale, some of which was sold in New York through branch offices, also failed to meet its burden of showing that the New York franchise tax was unreasonable as applied to it.

> ". . . [A]s the Company carried on the unitary business of manufacturing and selling ale, in which its profits were earned by a series of transactions beginning with the manufacture in England and ending in sales in New York and other places—the process of manufacturing resulting in no profits until it ends in sales—the State was justified in atrributing to New York a just proportion of the profits earned by the Company from such unitary business."

266 U.S. at 282.

averaged eighty percent. Accepting these facts as found by the state court, and setting the resulting sets of figures against each other, the Supreme Court stated:

> ". . . [I]n any aspect of the evidence, . . . the statutory method, as applied to the appellant's business for the years in question operated unreasonably and arbitrarily, in attributing to North Carolina a percentage of income out of all appropriate proportion to the business transacted by the appellant in that State. In this view, the taxes as laid were beyond the State's authority."[29]

Unlike the proof adduced in *Hans Rees' Sons*, the evidence here did not undertake to show that the District of Columbia operations accounted for an identified percentage of General Motors total net income, which percentage could, as in *Hans Rees' Sons*, be compared with that taxed under the single-factor formula. The testimony offered by General Motors was largely that of economists who described the unitary character of the manufacturing and selling operations as respects the generation of profits, and who urged the three-factor formula as the one most likely to attribute a fair share of these profits to the District activities. Economic experts offered by the District dissented from this latter view, and insisted that the one-factor sales formula was a reasonable choice among alternative methods. Nowhere in the record do there appear specific percentages of the kind accepted by the Supreme Court in *Hans Rees' Sons*. That case, therefore, does not compel the decision in this; and, indeed, the evidence in the present record leaves us in the position in which the Supreme Court found itself in *Underwood Typewriter* and *Bass*.

"[T]he economic wisdom of state net income taxes is one of state policy not for our decision. . . ."[30] Indeed,

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[29] 283 U.S. at 135-136.

[30] *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. at 462.

there is no unity of agreement even among economists as to the factors which should be used or the weight each should be given in a reasonably accurate formula for state taxation of multi-state business.[31] Quite obviously, this court has no sound basis for ruling that one formula rather than another must be followed as the only legally permissible one, in the absence of a tangible demonstration, as in *Hans Rees' Sons*, that the formula under attack is operating indefensibly. The demonstration itself conceivably might take different forms, but each must reveal some concrete circumstance by which arbitrariness and irrationality, in the constitutional degree, may be identified.

V

The second constitutional attack by General Motors on the District's formula is based on an asserted violation of the commerce clause. A state-imposed income tax on a corporation which operates in interstate commerce does not violate the commerce clause merely because of that fact. The tax may be invalid if the corporation engaged "exclusively" in interstate commerce, with no local intrastate business. *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951). Or it may be invalid if it discriminates against interstate commerce "either by providing a direct commercial advantage to local business, *Memphis Steam Laundry* v. *Stone*, 342 U.S. 389 (1952) . . . [*cf. Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64 (1963)], or by subjecting interstate commerce to the burden of 'multiple taxation,' *Michigan-Wisconsin Pipe*

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[31] See Barber, *State Taxation of Net Income Derived from Interstate Commerce*, 48 A.B.A.J. 1133 (1962), and Britton, *State Taxation of Extraterritorial Value; Allocation of Sales to Destination*, 46 VA. L. REV. 1160 (1960), both of whom criticize the inclusion of a sales factor in an apportionment formula. For a short history of the varying proposals by tax experts for more perfect apportionment, see RATCLIFF, INTERSTATE APPORTIONMENT OF BUSINESS INCOME FOR STATE INCOME TAX PURPOSES, pp. 17-28 (1962).

Line Co. v. *Calvert*, 347 U.S. 157 (1954). . . ."[32] However, a tax which is fairly apportioned to local activities, and is non-discriminatory, is a valid exercise of the State's taxing powers. "While it is true that a State may not erect a wall around its borders preventing commerce an entry, it is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State." *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. at 461-62.

General Motors bases its commerce clause argument only on the ground that the District's single-factor formula discriminates against interstate commerce by resulting in unconstitutional double taxation of its income. It is undisputed that, as found by the Tax Court, the vehicles sold to customers in the District were manufactured largely in Michigan, Maryland, and Delaware. In the taxable years in question, General Motors paid these States a tax based on its net income, apportioned by each State on the basis of a three-factor formula of property, payroll, and sales, equally weighted.[33] This, of course, is the formula advocated in this case by the company.

As with the due process contention, the burden is on General Motors to show by specific evidence that "double taxation" would result from the application of the District's formula. This it has failed to do. The company has

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[32] *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. at 458.

[33] The taxes paid were:

Year	*State*	*Amount*
1957	Michigan	$8,955,799.55
1958	Michigan	6,940,309.50
1957	Maryland	510,792.31
1958	Maryland	271,425.75
1958	Delaware	127,844.95

produced only a hypothetical situation to prove its case: "Assume that Chevrolet has a net income of $3,000,000 derived from the manufacture and sale of automobiles sold to customers located in the District; that three-fourths of the manufacturing activity takes place in Michigan and one-fourth (including the activities of the zone or 'sales' office) takes place in Maryland. Michigan would tax 50% of the income (one-third of 75% property, 75% payroll, 0% of sales); Maryland would tax 16⅔% (one-third of 25% property, 25% payroll, 0% sales); and the District would tax 100% (sales alone). Chevrolet is taxed by the three states combined on 166⅔% of its total income."

Aside from the economic arguments that the income from these sales were attributable to operations in jurisdictions outside the District, no showing was made that the relatively minor portions of sales were not reasonably attributable to the concededly relatively minor scope of operations in the District. This court recognized in *Broadcasting Publications, Inc.* v. *District of Columbia* that exactitude is not possible in apportionment formulas:

> "In allocating Taxpayer's income for franchise tax purposes, neither the statute nor the Regulations attempt to determine what precise percentage of the income is attributable to each separate facet of the publication process and then allocate it geographically. That is unrealistic if not impossible." [34]

Secondly, and perhaps more importantly, the uniformity produced by the use of similar factors is more apparent than real. General Motors has pointed to only one facet of the apportionment process by which the tax

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[34] —— U.S.App.D.C. ——, ——, 313 F.2d 554, 559 (1962). See also *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. at 121, where the Supreme Court referred to "the impossibility of allocating specifically the profits earned by the processes conducted" within the borders of the taxing state.

structures of Michigan, Maryland, and Delaware, are similar to each other, and dissimilar to the District's structure. That facet consists of the factors which each uses to apportion business income to the respective states. However, the methods used to arrive at the portion of each factor which is attributable to the particular state are at least as important as the factors themselves in determining whether or not tax structures are similar. Similarity may or may not exist in the definition of local sales, the accounting procedures used, and the deductions permitted from gross income in order to arrive at net income.[35] In short, General Motors has not shown that the District's single-factor sales formula would impose a burden of double taxation.

> "Logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice. In practical operation, however, apportionment formulas being what they are, the possibility of the contrary is not foreclosed . . . . There is nothing to show

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[35] See Studenski, *The Need for Federal Curbs on State Taxes on Interstate Commerce: An Economist's Viewpoint*, 46 VA. L. REV. 1121 (1960); Barber, *supra*, note 31, at 1135. RATLIFF, *op. cit. supra* note 31, at 29-31, states:

> "Uniformity does not exist to the degree, however, that the [similarity of factors used] may suggest, for the factors are defined variously by the states. For example, among the locations to which sales are assigned are the locations of the following: office where negotiated, property at time of order, receipt or acceptance of order, negotiating personnel, point of delivery, and origin of shipment. Among the bases for allocating payrolls are: office location, time spent in the state, and compensation earned in the state.
>
> Generally the states provide for the direct allocation of certain types of income, such as capital gains, rents, royalties, dividends, and interest. However, 6 of the [states imposing a net income tax] make no provision for the direct allocation of any income. Usually states allow separate accounting in cases where the taxpayer shows that it more clearly reflects the income attributable to the state than does the formula, but again there are 6 that do not allow it."

that multiple taxation is present. We cannot deal in abstractions. In this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense. This they have failed to do." [36]

VI

Nothing that we have said should be taken to mean that the single-factor sales formula is the *only* permissible formula which the District Commissioners might adopt under the authority committed to them by Congress in the taxing statute. Our holding is only that neither the District Code nor the Constitution *prevents* the use of the present formula of apportionment. On March 22, 1961, the Finance Officer of the District recommended to the Commissioners that they adopt the same three-factor formula which General Motors here advocates. The District's Director of General Administration added his recommendation that the formula be approved. Adoption of the new formula would bring the District into line with the apportionment formulae now used by twenty-five of the thirty-seven States and the District of Columbia which levy taxes on or measured by net income.[37] The Finance Officer stated that the formula has been endorsed for use by all of the States on a uniform basis by a number of expert and informed groups. We have no reason to doubt the authority of the Commissioners to adopt a property-payroll-sales formula. What we said in *Smoot* is equally applicable to our holding in this case: "The value and situs of the corporation's property used in its operation could doubtless have been ruled to be a permissible factor in apportioning income . . . but to say that this would be

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[36] *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. at 462-63.

[37] These figures are found in RATLIFF, *supra* note 31, at 29-30. Not included in the author's computation, but added here, is the State of Michigan, which also employs a three-factor formula.

permissible does not demonstrate that it must be considered an indispensable factor." [38]

However, the judicial branch has neither the mandate nor the machinery to make the policy determinations implicit in the choice of an apportionment formula. This is a legislative responsibility which has been reposed by Congress in the District Commissioners, and its wise discharge necessitates the use of legislative methods of inquiry into, and resolution of, issues affecting the interests of the District, of which maximum tax revenue is but one. This court can deal only with the individual case as it arises, and once it is determined that a legislatively adopted formula is not prohibited by statute or the Constitution, our task is complete. As Mr. Justice Frankfurter has stated:

> "The complexity of the proposals of the [Civil Aeronautics] Board's Report—the items to be taken into account, the balance to be struck among them, the problem of giving the States their due without unfairly burdening an industry of vital national import—indicates how ill-adapted the judicial process is, as against the choices open to Congress, for dealing with these problems and how warily this Court should move within the limits of its own inescapable duty to act. The protection of interstate commerce against the burden of multiple taxation ought not to be left to litigation growing out of changes in the methods of taxation.
>
> "The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various

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[38] *Smoot Sand & Gravel Corp.* v. *District of Columbia*, 104 U.S. App.D.C. at 298-99, 261 F.2d at 764-65.

factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce.' *Freeman* v. *Hewitt*, 329 U.S. 249, 256."[39]

Having found that the single-factor sales formula employed by the District is permitted by the District Code, and not shown on this record to be violative of the Constitution, we hold that the franchise tax levied against the General Motors Corporation for the years 1957 and 1958 was a valid one. The decisions of the Disfrict of Columbia Tax Court are accordingly,

Reversed

DANAHER, *Circuit Judge*, dissenting: This court in *Smoot Sand and Gravel Corp.* v. *District of Columbia*[1] was urged to consider a three-factor formula consisting of manufacturing costs, business property located in the District and sales made here. But the opinion noted that no evidence had been offered to compel acceptance of that formula. Moreover, the petitioner had failed to show that an arbitrary and unreasonable result flowed from the regulation which directed the apportionment of net income by considering only sales. Thus we refused to say that the assessments were invalid and erroneous.

Here the Tax Court, after noting that most of the facts and the evidence based upon exhibits had been stipulated, further found:

"5. The segment of petitioner's business which was conducted both within and without the District of

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[39] *Braniff Airways, Inc.* v. *Nebraska State Bd. of Equalization & Assesment*, 347 U.S. 590, 606 (1954) (dissenting opinion).

[1] 104 U.S.App.D.C. 292, 298, 261 F.2d 758, 764 (1958), *cert. denied*, 359 U.S. 968 (1959).

Columbia consisted of the manufacture of a certain number of automobiles and kindred products without the District and the sale thereof to customers within the District. The net income from this segment of petitioner's business was earned by a series of transactions beginning with the manufacture of products in several states and ending with the sale to customers in the District. While the net income was not realized until sale, it was earned in part by manufacture of the products sold, including in addition to actual manufacture, procurement of material, financing, use of property and administration.

"6. The method used by the assessing authority of the District attributed to the District 100 per centum of the net income derived by the petitioner from that segment of its business which consisted of the manufacture without, and sale of the products within the District. The percentage thus determined was out of all reasonable proportion to the trade or business carried on or engaged in by petitioner within the District."

With *Smoot Sand and Gravel* before it, the Tax Court expressly found that the District's use of the single-factor sales formula had allocated to the District all of the petitioner's income, earned at all stages, although only certain final sales had occurred in the District. Thus the sales formula failed to apportion petitioner's income as the Code commanded where income from a sale within the District was actually earned "partly within and partly without" the District.

"If the trade or business of any corporation . . . is carried on or engaged in both within and without the District, the net income derived *therefrom* [that is, from *business* so carried on or engaged in both within and without the District] shall . . . be deemed to be income from sources within and without the District." D. C. CODE § 47-1580a (1961). (Emphasis added.)

The same section next provides that where net income is so derived, the *portion* subject to tax shall be determined under regulations prescribed by the Commissioners. Clearly the purpose of the statute is to reach only a "proper"—*i.e.*, an equitable and just—"portion" which shall be subject to tax. To that end, the Code authorized the Assessor to employ "any formula or formulas" provided by regulation "which, *in his opinion, should* be applied in order to *properly* determine the net income . . . subject to tax." (Emphasis added.) The language speaks in terms of what is right and reasonable and just and equitable according to the facts. At least that much is required to save the tax from becoming an invalid imposition. The Assessor is not empowered broadly to utilize "any formula," but only one which "should" be utilized that the amount of tax be "properly" determined. And we have so held:

> "It seems clear from the statutory provisions considered as a whole that the Assessor is vested with discretion to select the most appropriate formula from among those set out in the regulations. Where no appropriate formula appears in the regulations, we think he has authority to devise one which in his judgment will properly determine the net income subject to tax and the correct amount of the tax. His determination is of course subject to review in the courts." *District of Columbia* v. *Gallant Incorporated*, 110 U.S.App.D.C. 202, 204-05, 290 F.2d 745, 747-48, (1961).

Even if the Assessor shall have failed so to act, the Tax Court itself cannot be precluded for lack of a regulatory formula, from determining the income which is fairly apportionable to the District, we said. Accordingly, we remanded the case to the Tax Court, thus:

> "The Tax Court is directed to determine the amount of the income which is fairly attributable to the District by applying the August 6, 1953, regulations, in-

cluding if necessary the use of such formula or formulae as the Tax Court deems best suited for determination of that question in this case." 110 U.S.App. D.C. at 205, 290 F.2d at 748.

It does not do for the majority simply to say that as to *some* corporations and in *some* situations a single-factor formula may validly be utilized.[2] Nor is it an answer to *this* taxpayer's contentions that the records in *some* cases have shown no more than that the single-factor formula has not resulted inequitably. We are here dealing with a record which overwhelmingly sustains the Tax Court's findings. I deem its conclusion inescapable that the single-factor sales formula utilized by the Assessor was here proved to be arbitrary and inequitable in its result, and therefore not consistent with the requirement of the Code. Having reached that conclusion, the Tax Court did precisely what we said should be done to determine an *equitable* tax. Agreeably to the *Gallant* directive, *supra*, the Tax Court applied "such formula or formulae as the Tax Court deems best suited for determination of [the petitioner's net income] in this case."

Consistently with what we had said was its duty to use the formula best suited to the determination required by the Code, the Tax Court turned to the three-factor formula substantially as set forth in the Uniform Division of Income for Tax Purposes Act.[3] The Tax Court's decision noted that the parties had stipulated facts sufficient

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[2] See, e.g., District of Columbia v. Gallant Incorporated, 113 U.S.App.D.C. 92, 305 F.2d 761 (1962). After our remand in the first Gallant case, text *supra*, the Tax Court found the sales formula best suited in the circumstances. We affirmed the result as just and reasonable even as we observed that the sales test is not the only or necessarily the best test. Other factors may be equally or even more relevant, we noted.

[3] Approved 1957, by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association; and see *State Taxation of Net Income Derived from Interstate Commerce*, 48 A.B.A.J. 1133 (December 1962).

for the application of that formula. A study of the findings not only bears out that conclusion, but in my view, necessarily impels a rejection of the single-factor sales formula *as here applied.* I would affirm the Tax Court's decision.[4]

WILBUR K. MILLER and BASTIAN, *Circuit Judges*, concur in the foregoing dissenting opinion.

BURGER, *Circuit Judge, concurring in part and dissenting in part*: I agree with the majority that the Tax Court is probably without power to construct a three-factor formula to be substitute for the one-factor formula used by the Assessor. That the Tax Court's formula makes sense and the Assessor's does not is not the issue; rather it is a matter of where the power resides. I join with the dissent in viewing the Assessor's action as arbitrary and I would go further and hold that it is legally arbitrary and capricious, and hence violative of the statute under which the District purported to act. I would remand to require a reassessment of the tax, precluding the use of the one factor formula. Concluding that the Assessor's action was violative of the statute, I need not now reach the issue whether it was also violative of any constitutional protections.

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[4] The Finance Officer on March 22, 1961 recommended that the Commissioners adopt the three-factor formula as "the most accurate and equitable method yet devised for apportioning among the States the taxable net income of corporations operating in a number of States." The Commissioners on March 28, 1961 approved the proposed amendments to the regulations with such amendments as might appear necessary after public hearing, all to become effective as of January 1, 1962. With this case impending, final action seems to have been postponed.

APPENDIX D

[Caption omitted]

On Petitions for Review of Decisions of the District of Columbia Tax Court.

Before: Bazelon, Chief Judge, and Wilbur K. Miller, Fahy, Washington, Danaher, Bastian, Burger, Wright and McGowan, Circuit Judges, sitting *en banc*.

JUDGMENT

These cases came on to be reheard en banc on the record from the District of Columbia Tax Court, and were reargued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the decisions of the Tax Court on review herein are reversed, and these cases are hereby remanded to the District of Columbia Tax Court for proceedings not inconsistent with the opinion of this court.

It is further ORDERED by the court that petitioner recover from respondent its taxable costs in these cases.

Per Circuit Judge McGowan.

Dated: February 13, 1964.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Caption omitted]

ON PETITION FOR MODIFICATION OF JUDGMENT

Filed May 7, 1964

Before: BAZELON, Chief Judge, WILBUR K. MILLER, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, WRIGHT and MCGOWAN, *en banc*.

PER CURIAM: In the prior opinion of this court in these cases, it was stated at page seven of the slip opinion that:

> "General Motors paid the assessment under protest, and appealed to the Tax Court. In that court, two primary arguments were urged as to the invalidity of the assessed deficiencies; one, that the numerator of the sales formula was too broad, in that it included sales which were not 'District sales'; and, two, that use of the single factor apportionment formula itself was permitted neither by the District Code nor by the Constitution."

On page eight this court stated that:

> "For the purposes of this appeal, [General Motors] appears to concede the correctness of the figures found by the Tax Court as representing 'District sales'. The controversy before us, therefore, does not relate to the definition of what sales by General Motors may properly be taken to be 'District sales', made in the course of a business activity which is carried on both within and without the District. It relates, rather, to the formula to be used for apportioning to the District that part of General Motors entire net income attributable to its 'District sales'."

General Motors has petitioned for a modification of this court's judgment to the limited extent of remanding the cases to the Tax Court for consideration of the application of the regulation embodying the single-factor formula to the facts. It is said that, since the Tax Court found that regulation invalid and proceeded to apply one of its own, there was never any adjudication of the contentions made by the taxpayer as to the proper scope of the application of the former to its D. C. operations. There having been no ruling on these contentions, adverse or otherwise, there was, of course, nothing to be made the subject of an appeal, or to be waived, by the taxpayer.

We find this request to be meritorious and, indeed, consistent with the above-quoted passages from our prior opinion. We are also satisfied from an examination of the record that this issue was not stipulated away by General Motors. General Motors is, it seems to us, entitled to press, and to have resolved, its contentions with respect to the proper determination of "District sales" for purposes of a one-factor formula regulation which we, unlike the Tax Court, have found to be valid.

The petition is, accordingly, granted; and our earlier judgment is modified to the extent of providing that the reversal of the Tax Court decisions is to be accompanied by remand to the Tax Court for such further proceedings as are not inconsistent herewith.

It is so ordered.

WILBUR K. MILLER, DANAHER and BASTIAN, *Circuit Judges*, dissenting: Even as modified the majority opinion remains unacceptable to us. We adhere to the position more fully stated in our original dissent.

APPENDIX F

[Caption omitted]

Before: BAZELON, Chief Judge, and WILBUR K. MILLER, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, WRIGHT, and MCGOWAN, Circuit Judges, in Chambers.

ORDER

On consideration of respondent's petition for modification of this Court's judgment of reversal, dated February 13, 1964, of the opposition thereto by the District of Columbia, and of respondent's reply, it is

ORDERED by the Court that respondent's aforesaid petition for modification is hereby granted.

Per Curiam.

Dated: May 7, 1964

Circuit Judge Burger did not participate in the forgoing order.

APPENDIX G

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. UNITED STATES CONSTITUTION:

Art. I, Sec. 8, clause 3:

"The Congress shall have Power—

* * * *

"To regulate Commerce * * * among the several States, * * *;"

Fifth Amendment:

"No person shall * * * be deprived of life, liberty or property, without due process of law; * * *."

2. DISTRICT OF COLUMBIA INCOME AND FRANCHISE TAX ACT OF 1947, Act of July 16, 1947, 61 Stat. 328, ch. 258, as amended by Act of May 3, 1948, 62 Stat. 206, ch. 246:

Sections 1 and 2, Article I, Title X (Sections 47-1580 and 47-1580a, D.C. Code, 1961):

"Sec. 1. PURPOSE OF ARTICLE.—It is the purpose of this article to impose (1) an income tax upon the entire net income of every resident and every resident estate and trust, and (2) a franchise tax upon every corporation and unincorporated business for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District: *Provided, however,* That in the case of any corporation, the amount received as dividends from a corporation which is subject to taxation under this article, and, in the case of a corporation not engaged in carrying on any trade or business within the District, in-

terest received by it from a corporation which is subject to taxation under this article shall not be considered as income from sources within the District for the purpose of this article. The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District: *Provided further*, That income derived from the sale of tangible personal property by a corporation or unincorporated business not carrying on or engaging in trade or business within the District as defined in title I of this article shall not be considered as income from sources within the District for purposes of this article, with the exception of income from sales to the United States not excluded from gross income as provided in title III, section 2(b)(13) of this article."

"Sec. 2. ALLOCATION AND APPORTIONMENT. —The entire net income of any corporation or unincorporated business, derived from any trade or business carried on or engaged in wholly within the District shall, for the purposes of this article, be deemed to be from sources within the District, and shall, along with other income from sources within the District, be allocated to the District. If the trade or business of any corporation or unincorporated business is carried on or engaged in both within and without the District, the net income derived therefrom shall, for the purposes of this article, be deemed to be income from sources within and without the District. Where the net income of a corporation or unincorporated business is derived from sources both within and without the District, the portion thereof subject to tax under this article shall be determined under regulation or regulations prescribed by the Commissioners. The Assessor is authorized to employ any formula or formulas pro-

vided in any regulation or regulations prescribed by the Commissioners under this article which, in his opinion, should be applied in order to properly determine the net income of any corporation or unincorporated business subject to tax under this article."

3. DISTRICT OF COLUMBIA INCOME AND FRANCHISE TAX REGULATIONS, as promulgated August 6, 1953 and relettered by amendment of July 24, 1956:

"Sec. 10-2(c). *Income Attributed to the District of Columbia.* If the trade or business is carried on or engaged in wholly within the District, the entire net income from trade or business shall be allocated to the District. If the trade or business is carried on partly within and partly without the District, that portion of the net income from trade or business to be apportioned to the District shall be determined as follows:

"(1) Income from sales of tangible personal property.

(a) Where income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. Every corporation and unincorporated business which carries on or engages in business in the District within the meaning of the words 'trade or business' as defined in the Act is, unless specifically exempted by some provisions of the Act, subject to tax. For the purpose of this regulation, the phrase 'District sales' shall mean all sales to District customers the income from which is fairly attributable to the trade

or business carried on or engaged in within the District, including solicitation in the District by salesmen or other representatives of the taxpayer, that portion of sales to customers outside the District the income from which is fairly attributable to the trade or business carried on in the District, and sales of tangible personal property the income from which is from District sources."

APPENDIX H *

	1957			1958		
	Single Factor	Two Factor	Three Factor	Single Factor	Two Factor	Three Factor
	Destination Sales	(1) Gross Owned and Rented Property (2) Payroll	(1) Gross Owned and Rented Property (2) Payroll (3) Destination Sales	Destination Sales	(1) Gross Owned and Rented Property (2) Payroll	(1) Gross Owned and Rented Property (2) Payroll (3) Destination Sales
Apportionable Income	$1,312,092,839	$1,312,092,839	$1,312,092,839	$653,396,893	$653,396,893	$653,396,893
Apportionment Percentage	.3930%	.0348%	.1542%	.4144%	.0366%	.1625%
Apportioned Income	5,156,525	456,608	2,023,247	2,707,677	239,143	1,061,769
Income Directly Allocated	10,320	10,320	10,320	15,418	15,418	15,418
Taxable Income	$ 5,166,845	$ 466,928	$ 2,033,567	$ 2,723,095	$ 254,561	$ 1,077,187
Rate of Tax	.05	.05	.05	.05	.05	.05
Tax	$ 258,342.25	$ 23,346.40	$ 101,678.35	$ 136,154.75	$ 12,728.05	$ 53,859.35

Computation of Apportionment Percentage:

1. Gross Owned and Rented Property								
(a) In District—								
Gross Owned	$ 378,476				$ 347,025			
Rented (rent x 8)	982,200				979,184			
Total	$ 1,360,676				$ 1,326,209			
(b) Everywhere—								
Gross Owned	$6,146,870,978				$6,295,491,112			
Rented (rent x 8)	100,289,392				108,182,464			
Total	$6,247,160,370				$6,403,673,576			
Percentage (a) ÷ (b)	.0218%		.0218%	.0218%	.0207%		.0207%	.0207%
2. Payroll								
(a) In District	$ 1,268,180				$ 1,233,787			
(b) Everywhere	2,662,072,037				2,354,049,741			
Percentage (a) ÷ (b)	.0477%		.0477%	.0477%	.0524%		.0524%	.0524%
3. Sales								
(a) To District Customers	$ 37,185,704				$ 32,542,519			
(b) To All Customers	9,461,855,874				7,853,393,381			
Percentage (a) ÷ (b)	.3930%	.3930%		.3930%	.4144%	.4144%		.4144%
Total Percentages		.3930%	.0695%	.4625%		.4144%	.0731%	.4875%
Average Percentage		.3930%	.0348%	.1542%		.4144%	.0366%	.1625%

* Stipulated data (R. 465-9, 470e-470f, 477-81) and computations based thereon.